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THE

ONTARIO WEEKLY REPORTER

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JANUARY-MAY, 1907

EDITOR:
E. B. BROWN, ESQUIRE
BARRISTER, ETC.

VOLUME IX.

TORONTO:
THE CARSWELL COMPANY, LIMITED
1907.

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THE

ONTARIO WEEKLY REPORTER

(To and Including January 12th, 1907).

VOL. IX. TORONTO, JANUARY 17, 1907. No. 1

BRITTON, J. JANUARY 2ND, 1907.

TRIAL.

GODERICH ENGINE AND BICYCLE CO. v. MENZIES.

Contract — Refitting Steam Yacht — Work and Labour— Materials Supplied—Action for Price — Specifications — Authority of Agent—Quantum Meruit—Incomplete Work —Defective Work—Deductions—Counterclaim—Damages for Delay—Penalty—Interest—Costs.

Action for the price of an engine and boiler and for work and labour done and materials furnished in the fitting up of defendant's steam yacht "Oriana."

W. Proudfoot, K.C., for plaintiffs.

Strachan Johnston and W. N. Tilley, for defendant.

BRITTON, J.:—Plaintiffs first claimed under an alleged special contract which it was said they fully performed, except so far as it was changed, and so far as the performance of certain minor details was waived by defendant.

The action was first tried before Magee, J., . . . and a judgment was rendered in favour of plaintiffs for $5,110.40.

On 14th June, 1906, a Divisional Court set this judgment aside and directed a new trial, giving plaintiffs leave to amend their statement of claim, and directing that the evidence taken at the former trial should be treated as evidence given at the new trial, with liberty to either party to adduce further or additional evidence. . . .

Plaintiffs amended their statement of claim, and now allege that no completed agreement was entered into between

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the parties, but plaintiffs supplied the engine and boiler, made the alterations, and did the work required of them on the "Oriana" at the request of and under the direction of defendant. Plaintiffs claim . . . $5,266.83 and interest.

The amended statement of defence is that plaintiffs did not do the work, if and so far as they did it at all, at defendant's request, but plaintiffs did certain work in pretended performance of a certain agreement and in accordance with certain specifications therefor. Defendant denies completion within the time agreed—indeed denies completion at all, and sets up generally non-compliance with the agreement and with the specifications.

The second trial took place before me . . . and additional evidence was given. . . .

Negotiations for the doing of the work sued for began between Thomson, plaintiffs' manager, and defendant on 5th September, 1904. One J. R. Sinclair was authorized by plaintiffs to make a contract with defendant, and negotiations continued between Sinclair and defendant. Apparently in a letter written by Sinclair before 4th February, 1905, he had named $6,250 as the amount plaintiffs wanted for making over this yacht. . . . On 4th February, 1905, defendant wrote to Sinclair, addressing him as the agent of the Goderich Ironworks, as follows:—

"As it will be impossible to make the fullest details in reference to proposed contract on the yacht 'Oriana,' would say that if satisfactory to you to start work on the construction at the prices named by you in a previous letter, of $6,250, together with the boiler and machinery for the work as described by you to Mr. St. John, together with what has been already discussed, it will be satisfactory to me; also providing that with one exception, that of the boiler having to stand a certain pressure. This is a point open for question, and I would prefer to settle it before entering into a contract. . . . As to terms proposed, they will be satisfactory to me, I of course paying interest or giving security upon the boat, at my option to do so, paying a rate not higher than 6 per cent. This to be arranged for any reasonable time. I trust in the meantime, however, you will obtain your specifications, blue prints, and everything necessary, and have them ready by my return from the south, when we will go wholly into the whole matter in detail as much as possible, which I think

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we can do without any diversion of opinion. The boiler and engine to be of the size and style as discussed with Mr. St. John here yesterday. . . It is understood that the material and workmanship will be complete in every respect, and that the boat is to be delivered complete in every detail and ready for use not later than 15th June, 1905, no detail to be omitted, notwithstanding that it may not be specified in this letter, and everything to be done to the satisfaction of Mr. D. P. St. John, and accepted by him before final settlement. . . . This is rather an impromptu way of letting a contract, but it is necessary to act promptly in order to have the work completed within the specified time. Steam reverse and independent cut-off to be $250 in addition to above figures, making a total for the work of $6,500."

This letter was handed to Mr. Sinclair, and he wrote at the bottom, "Accepted, Goderich Engine Co., per J. R. Sinclair."

This does not profess to be and it was not a completed contract, but was an outline or rough statement, in bulk, of work to be done by plaintiffs for defendant in transforming or making over the "Oriana," for which defendant was to hand over the old boiler and engine on that boat, considered to be worth $1,000, and pay to plaintiffs in addition $6,500 in cash. Plaintiffs are a corporation. No doubt, defendant knew that if a formal contract was to be entered into, Sinclair was not an officer of the corporation to execute. Sinclair was then agent of plaintiffs—a person paid by commission for any orders for work sent in to plaintiffs which plaintiffs accepted, but he was not an officer of the corporation. This writing of 4th February was taken in good faith and to be acted upon in good faith by plaintiffs and defendant, and defendant was willing to take the risk and did take the risk of allowing plaintiffs to go on with work, depending upon their subsequently arriving at a perfectly satisfactory understanding as to just what was to be done for the $7,500.

This letter was handed to the president of plaintiff company on the 6th, and plaintiffs, relying upon that, and with the information gained in conversation prior to 4th March, commenced work at once. There was apparently to be ascertained the work described by Sinclair to St. John, together with what had already been discussed, and the point of the boiler standing a certain pressure. This latter was expressly

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mentioned as something to be settled before entering into any contract. Then the terms of payment were to be arranged.

. . . .

Plaintiffs endeavoured to get particulars of what work was discussed between Sinclair and St. John, and St. John, who was acting for defendant, wrote to plaintiffs on 13th February, 1905, that he had taken notes of the various changes to be made, that he was having these written out, and promised to send them, and, apparently to enable him to so so, he asked for a copy of a proposal made by plaintiffs in November or December, 1904, but on 15th February, without waiting for or getting the letter asked for, sent a carefully prepared memorandum of alterations. Mr. St. John said he would not be responsible for these without the approval of defendant, and so sent this memorandum "without prejudice"—whatever that might mean under the circumstances. Whether binding upon defendant or not, it was at least a statement by the person mentioned by defendant, as the person to whose satisfaction the work was to be done, of the particulars or specification of the work. . . . Plaintiffs proceeded as best they could, treating the memorandum as what defendant required.

Sinclair shortly after 4th February, 1905, as between him and plaintiffs, considered his work completely done, and promptly applied for and was paid his commission.

After this and on or about 26th February, 1905, after defendant's return from the south, defendant and Sinclair met. Here is an extract from Sinclair's evidence:—

Q. And what took place between you then? A. We prepared the document I presume you have in your hand.

Q. Prepared the specifications? A. Yes.

Q. Was Mr. St. John there? A. Mr. St. John had prepared them, and we went over them.

Q. Had you a copy? A. No, not then.

Q. How did you know he had prepared them? A. Well, he struck the copies off.

Q. How did you know? A. Mr. Menzies told me.

Q. Then you took this specification that Mr. St. John had prepared, and what did you do with it? A. I signed it with a very few alterations. There were some minor alterations that were omitted by Mr. St. John.

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These specifications, so signed, were never given to plaintiffs. One copy was retained by Sinclair until, after litigation, he gave it to defendant's solicitor. This document was not signed in form as a contract. There was nothing purporting to be a contract signed embodying these specifications as part of it. Sinclair put at the bottom of the last page "O.K., J. R. Sinclair," and on the preceding page the following: "The specification contained herein is in accordance with my understanding. Goderich Engine Co., per J. R. Sinclair."

This can be regarded as nothing more than a mere statement made by Sinclair, so far as he remembers, of the particulars of what took place on or prior to 4th February, between him and defendant, either in presence or absence of St. John. Sinclair does not say in his evidence (apparently he was not asked) that the specifications so signed were the same as discussed between him and defendant, although he does say in his evidence that he fully discussed these with Thomson. Thomson's evidence does not agree with this. . . . I think it quite clear upon the whole evidence, including that of defendant, that these specifications were prepared wholly by defendant, using the ones prepared by St. John as a basis, and that Sinclair quite willingly signed at defendant's request. I am of opinion that page 7 was not attached when Sinclair signed page 6. The omission was probably quite accidental, but it is a circumstance to shew that Sinclair was not acting bona fide as the agent of plaintiffs, but was, and to the knowledge of defendant, acting for and in the supposed interest of defendant. Sinclair knew, as defendant did, that plaintiffs were going on with the work, and yet Sinclair retained, and this, so far as appears, without the knowledge of defendant, this important paper. When Sinclair says he discussed these with Mr. Thomson, I must, as between Sinclair and Thomson, accept the evidence of the latter.

No doubt it is well settled law, as in Appleby v. Meyers, L. R. 2 C. P. 651, that a person who contracts to do an entire work for a specific sum, cannot recover anything unless the work be done, or unless it can be shewn that it was defendant's fault that the work was incomplete, or that there is something to justify the conclusion that the parties have entered into a new contract. See King v. Low, 3 O. L. R. 234, 238. This is a different case. Plaintiffs were permitted to enter upon a work to be done on defendant's boat for a

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specific sum, without any agreement as to the details of the work to be done, and no agreement was subsequently arrived at as to precise details. The parties were not far apart, but they were not together. Plaintiffs accepted the details or specifications as furnished by St. John—defendant did not, but insisted that the agreement as to specifications was an oral one, the same as set out in a written memorandum signed by Sinclair.

Upon the whole facts, defendant having got and now having the benefit of plaintiffs' work and expenditure of money, plaintiffs are entitled to succeed as upon a quantum meruit. . . . It is in evidence that defendant gave an active supervision to the work being done, giving directions and making changes, minor changes, but changes as the work progressed. Defendant also paid money on account as the work progressed.

. . . .

I am of opinion that the action can be maintained, and that plaintiffs should recover, even if there was in fact such a special contract as defendant sets up in his statement of defence. If the case goes farther, and if it be necessary for plaintiffs to again amend so that justice may be done between the parties . . . such amendment should be allowed.

. . . .

The special contract as alleged by defendant was substantially performed, and defendant accepted the boat upon plaintiffs undertaking that certain things not done would be done. As to the things to which defendant objected, he waived the objections and accepted the boat and work done on it, trusting to plaintiffs subsequently making good what was deficient. . . .

[Reference to Whittaker v. Dunn, 3 Times L. R. 602; Monroe v. Bell, 8 E. & B. 753, 754.]

In the present case there was much besides the mere taking of possession. The boat is a chattel, and was never offered to defendants with a request to complete.

I think the boat was accepted by defendant on 12th August, 1905. The evidence upon that point is in part as follows: "After the trial of the boat, Thomson asked, 'What are you going to do with me?' Defendant replied, 'What do you want me to do?' and Thomson said, 'Take the boat and put me off,' and defendant said, 'All right, go on off.'" Then there was a conversation about money, and Thomson says defendant told him to draw for $3,000, at say 30 or 60 days.

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There was then not complete the stairs, which Thomson was to have sent up, and did afterwards send up. There was netting to be painted, and material and brushes were left to do this painting. Defendant did not want it done that day . . . . A bell-pull was to be put in on the bridge, and defendant was to have his engineer put it on. This was subsequently furnished, handed to defendant.

Thomson and his 3 men left the boat, and in accordance with what he says plaintiffs consented to make a draft upon defendant for $3,000, which, however, was not accepted. . .

It certainly does not appear unreasonable, considering the actual position of the matter on 12th August, that defendant should take the boat over and promise to pay the account, upon the understanding, express or clearly implied, that plaintiffs would do or cause to be done any of the small things not then done which were under discussion. . . . I think there was abundant evidence from which acquiescence on the part of defendant to take the boat on terms described by Thomson can be inferred.

Prior to 12th August the boat had been taken out twice, and 3 or 4 dock trials had been given, getting up steam and moving machinery. Defendant was present on these occasions. Upon the trip to the Rochester races, no doubt, defendant was sorely disappointed in his boat; she was not speedy; there was difficulty in getting up steam; and from whatever cause or causes defendant was dissatisfied. After defendant's return he found very considerable fault, more, in my opinion, than was attributable to plaintiffs. At the trial before me all defects and blemishes great and small were urged as failure on plaintiffs' part, and as things that defendant was, even then, entitled to complain about, and by reason of which to resist payment of any part of the balance claimed. . . . .

The objections relied upon by counsel for defendant were: (1) boiler would not properly steam; (2) engine out of line; (3) air pump defective; (4) leak in boiler; (5) reverse gear did not work properly; (6) cut-off would not work; (7) engine not plumb; (8) stern hole for propeller shaft not bored true and stern tube not set true; (9) cabin door to be opened to give access to rear of boiler; (10) cabin stairs not in place; (11) china closet not in; (12) deck leaked; (13) painting of netting not done; (14) bell-pull not on.

Some other things were mentioned by St. John in his evidence, or some of the above were described in a different

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way, but, apart from the small items mentioned and taken into consideration on 12th August, when Thomson and his men left the boat, the evidence does not establish that defendant has reasonable ground of complaint.

The defects of which a good deal was made at the time were want of steam, engine not plumb, or in line, and these objections were cleared away by the evidence. Defendant was present when engine set, or part of the time. He knows a great deal about how such should be done. The best evidence of what Mr. St. John thought about all these defects, or rather about all in which plaintiffs failed, is that at the time of the attempted settlement he appraised what ought to be charged against plaintiffs at under $75, exclusive of any defects in the engine or the reverse gear and leakage of the boiler, and some few other things. . . . I have given the evidence the best consideration possible for me, and agree that, so far as established against plaintiffs, the allowance of the amount of extras against what plaintiffs would be liable for is doing complete justice to defendant.

The letter of 4th February requires everything to be done to the satisfaction of Mr. O. P. St. John, and accepted by him before final settlement. During the progress of the work Mr. St. John was ill, and could take no part in seeing how the work was being done. In October, when well enough, the boat was housed and the machinery taken apart by defendant, but, so far as Mr. St. John could and did examine, he was apparently satisfied, with certain exceptions for which plaintiffs are not responsible, if plaintiffs would make the allowance of a sum under $75, and plaintiffs were willing to make a larger allowance. Apart from that, as defendant took charge and acted, instead of having Mr. St. John act for him, and from the way the work was carried on between plaintiffs and defendant; I am of opinion that whatever was required of Mr. St. John was, on and prior to the day of meeting in October, waived by defendant.

As to the penalty of $1,500, I have already held that plaintiffs were not bound by the so-called specifications in which this amount appears. Even if these were the only specifications or evidence of what Sinclair agreed to, the insertion of such a penalty is no part of "specifications" properly so called. No doubt, some amount was discussed, and defendant did by letter plainly call plaintiffs' attention to this, but that was after the work had been entered upon by plain-

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tiffs, after all connection between plaintiffs and Sinclair had ceased, and this cannot be sufficient to make plaintiffs liable for that amount either as a penalty or as liquidated damages. . . . .

My findings are in favour of plaintiffs upon the issues in the pleadings, except upon defendant's counterclaim. . .

Defendant by his counterclaim asks for damages to the amount of $3,000. It is difficult to see just what, if any, pecuniary loss defendant sustained by reason of not getting the boat by 15th June. That he did not get her in commission earlier in the season of 1905 than August was, doubtless, an annoyance and inconvenience to defendant, and he was put to some little expense in looking after the boat and his interest in the work from 15th June to the date of his getting her. Defendant did not desire the boat for charter, but for his own pleasure. He got her in August, and made very little use of her, and, so far as appears, not very profitable or pleasurable use. The statement that some person talked of a charter at $3,000 for the season was not competent evidence to prove damages. With no way of arriving at an exact amount . . . I will allow $500, and that I consider most ample in the circumstances. It seems to me out of the question to talk about $3,000 damages or even $1,500 as actually sustained, or such as could reasonably be claimed by defendant. What defendant thought of the $1,500 was as a penalty, and not as liquidated damages. This sum of $1,500 could "not be regarded as a genuine pre-estimate of the creditor's probable or possible interest in the due performance of the principal obligation:" see Harrison v. Wright, 13 East 342. . . .

Judgment for plaintiffs for $5,360.90, and for defendant on the counterclaim for $500, leaving $4,860.90 in favour of plaintiffs, and plaintiffs are entitled to interest at 5 per cent. from 12th September, 1905, 30 days after delivery of boat. . . . This will be $317.30, making in all for plaintiffs $5,178.20.

Plaintiffs are entitled to all costs. The costs of the former trial and of the appeal to a Divisional Court were reserved to the trial Judge to be disposed of by him. Plaintiffs are entitled to the costs of the former trial and of the appeal and of the last trial. No costs to defendant of counterclaim.

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ANGLIN, J. JANUARY 4TH, 1907.

CHAMBERS.

VANO v. CANADIAN COLOURED COTTON MILLS CO.

Discovery—Examination of Parties—Next Friend of Infant Plaintiff—Rules 439, 440.

Appeal by plaintiff from order of MONCK, local Judge at Hamilton, dismissing plaintiff's motion to set aside an appointment issued by defendants for the exafflination of one Budimer Protich, the next friend by whom plaintiff brought this action.

J. L. Counsell, Hamilton, for plaintiff.

C. W. Beil, Hamilton, for defendants.

ANGLIN, J.:—The question raised is whether, under our code governing discovery, the next friend of an infant litigant is examinable for discovery. Plaintiff is 16 years of age, and it is not denied that he is capable of being examined. The defendants assert an absolute right to examine the next friend as a party to the litigation adverse in interest to themselves.

That an infant plaintiff, if of capacity to give evidence, is examinable for discovery is now well established: Arnold v. Playter, 14 P. R. 399; Flett v. Coulter, 4 O. L. R. 714, 1 O. W. R. 775.

Our Rule 439 renders liable to examination for discovery "a party to an action or issue, whether plaintiff or defendant." English Order XXXI., Rule 1, permits a plaintiff or defendant by leave of the Court to examine by interrogatories "the opposite parties or any one or more of such parties." Though, under the English practice, an infant party could not formerly be compelled to give discovery: Curtis v. Mundy, [1892] 2 Q. B. 178; Mayor v. Collins, 24 Q. B. D. 361; it was held that the next friend of an infant was not "a party to the action," within the meaning of the English Rule to which I have referred, from whom a party opposite in interest to the infant could compel discovery: In re Corsellis, 48 L. T. 425. This inability to secure any discovery from an infant

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litigant led to the adoption in England, in November, 1893, of what is now Rule 29 of Order XXXI., which extends the application of that Order expressly to "infant plaintiffs and defendants and to their next friends and guardians ad litem." Our code of Rules contains no corresponding provision. The words of our Rule "party to an action or issue, whether plaintiff or defendant," are no wider than the words of Rule 1 of the English Order, "the opposite parties or any one or more of such parties." The next friend of an infant litigant, if not covered by these later words, is not within the former. He is not a party to the action, he is simply put there to protect the interest of the infant, and to shew that the action is of such a nature that he willing to guarantee costs, and in making himself liable for costs he is in no way a party to the action, and I have no jurisdiction to make an order on him as if he were a party: Dyke v. Stephens, 30 Ch. D. 189, 190.

Neither is the next friend "a person for whose immediate benefit an action is prosecuted or defended," within the purview of Rule 440.

The appeal will be allowed and the appointment for examination of the next friend will be set aside. The costs of the appeal and of the motion before the local Judge will be to plaintiff in any event of the action.

MAGEE, J. JANUARY 5TH, 1907.

TRIAL.

DUNSTAN v. NIAGARA FALLS CONCENTRATING CO.

Contract—Goods to be Manufactured by Plaintiff—Refusal of Defendants to Accept—Statute of Frauds—Place of Making Contract—Foreign Country—Application of Ontario Law.

Action for damages for defendants' refusal to accept and pay for certain labels manufactured by plaintiff for them under an alleged agreement between them. The items were $177.79 for 142,240 labels for bottles of extract at $1.25 per 1,000, and $215 for 11,635 labels of three different sizes for

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bottles of perfume, "Rose of Erin," and 7,310 neck labels for same, the total being $392.79.

The statement of defence denied the contract and alleged that the goods were not of good quality or workmanship, and not equal to sample agreed upon, and not fit, as they were to have been, for the purposes of defendants' business, and claimed the benefit of the Statute of Frauds and sec. 9 of R. S. O. 1897 ch. 146.

MAGEE, J.:—Plaintiff has a lithographing establishment in Buffalo, N.Y. Defendants in 1902 and part of 1903 had their place of business at Niagara Falls in Ontario, but had also an office across the boundary at Niagara Falls, N.Y.

Early in August, 1902, Mr. Francis Stuart went to plaintiff's office in Buffalo with a view to having some labels made for defendants. Some of them were intended for small bottles of extracts, such as vanilla, lemon, etc. The others were intended for bottles of a new brand of perfume to be put on the market under the name of "Rose of Erin." There were to be three sizes of these bottles, each requiring a different sized label, and all having a smaller label round the neck. Nothing definite was then discussed or arrived at either as to design, quantities, or prices, but plaintiff was to have sketches of designs prepared and submitted to defendants. Sketches were made and sent to defendants, who, on 2nd September, 1902, wrote that they were unsatisfactory, and suggested that some of plaintiff's salesmen should call. Soon afterwards Mr. Denny, of the plaintiff's staff, called on Mr. Stuart at Niagara Falls, Ontario, and discussed what was wanted and arranged to have other designs prepared and to submit them to defendants with quotations of prices.

On 19th September plaintiff wrote defendants with two revision sketches for approval and quoting prices for 100,000 extract labels at $1.25 per 1,000, and for 100,000 perfume labels at $2 per 1,000. This was followed up by a visit by Mr. Denny to defendants about 8th October, when the sketches were discussed and approved in a general way, with minor changes and suggestions. Prices and quantities for the perfume labels were not fixed, as the defendants had not decided how many in all or of each size would be required, but $1.25 was quoted by Denny for 5,000 of the medium size. For the extract labels, the quotation of $1.25 per 1,000 for 100,000, was adhered to, but the quantities for each different sort of

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extract had not been settled on, but it was understood 100,000 would be taken.

On 10th October plaintiff wrote defendants of having received their order through Denny for 100,000 extract labels at $1.25 per 1,000, f.o.b. Buffalo, and setting out various stipulations as to alterations, accidents, shipment, payment, etc. On 11th October defendants wrote plaintiff giving quantities of each of the three sizes of perfume labels required, 10,000 in all, and 6,000 neck labels. They had previously on 8th October written plaintiff requesting some additional lettering in the design—and on 14th October they wrote to have a change made in the wording of the extract labels. On 15th October plaintiff wrote defendants of having received, through Mr. Denny, their order for the 16,000 perfume labels, stating the quantities in defendants' letter of 11th October, but not mentioning any price.

After this plaintiff went on and had the designs lithographed, and proofs in colours were sent to defendants for approval. The proofs so sent were from time to time returned to plaintiff with objections or suggestions for variation. This does not appear to have been done by letter in any case, but by some one calling at plaintiff's office in Buffalo with the proofs, and pointing out what changes or improvements were to be made. The extract label proofs were finally approved, and plaintiff alleges that the proof for the perfume labels was finally approved excepting only a change in the direction of the corrugating lines of the "silk finish," which did not require the submission of a further proof. Defendants, however, assert that they had objected also to the shade of the background and to the dullness of the gold, and that they expected another proof to be submitted. It does not appear that at any of these interviews in Buffalo there was any further discussion as to prices or quantities. Finally in February, 1903, a quantity of extract labels, not the full amount, were shipped to defendants, who, on 17th February, wrote that they were a failure and not to make any more till an interview could be had. Practically all the extract labels had then been finished. Some perfume labels, 1,000 of each size, were also forwarded in February, and on 28th February reached defendants, who at once wrote that they also were disappointing and useless to them. All the perfume labels had then been finished. On 14th March the plaintiff wrote them to agree to shipment of the remainder. It would seem

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that those shipped were consigned to defendants at Niagara Falls, N.Y. In replying on 16th March defendants, while objecting to the goods, and saying they would not dream of accepting them, reminded plaintiff that they had met his advanced figures without a murmur. Further correspondence followed without any settlement of differences, and plaintiff's draft in January, 1904, for $392.74, was refused. The labels left in plaintiff's hands are of course useless to him. The labels, it appears, were really ordered for a firm of Stuart, Northcott, & Co., consisting of Mr. Northcott, and a son of Mr. Francis Stuart, whose name appears on them. That firm moved to Toronto in April, 1903.

Upon the evidence I find that plaintiff complied with the requirements of the order. Various objections are made by one witness or another called by defendants—almost all of them are negatived by some one else of those witnesses. The chief objection on account of the dullness of the gold finish is, I think, largely, if not entirely, owing to the corrugation of the silk finish which Mr. Francis Stuart approved and still maintains to be desirable against the view of some others whom he calls. Dissatisfaction with the general effect may be unconsciously increased in his mind by a combination of colours, which subsequently may not have appeared happily chosen, and the early removal of the other firm would not tend to make his scrutiny less exacting. If plaintiff be entitled to judgment, he at most could only ask defendants to accept 100,000 of the extract labels, which would be $125, and 16,000 of the perfume labels, the price of which, except as to $1.25 for the 5,000 of medium size, is left uncertain, but which, considering the quotations, the variations, and the smallness of the neck labels, I fix at $180, making $305 in all, to which interest from 1st March, 1903, should be added.

The next question is, are defendants legally liable? They set up the absence of writing under the Statute of Frauds, and Lord Tenterden's Act, sec. 9 of R. S. O. 1897 ch. 146. If the contract is to be deemed as made in Ontario, I am unable to find in the correspondence a sufficient note or memorandum in writing signed by defendants to comply with the requirements of the statute as to any of the labels. Nor do I find that there was any acceptance of any part of the goods sufficient to take the place of the writing. It does not appear, if that were material, that they even brought the labels from Niagara Falls, N. Y., to their office in Ontario.

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If the contract should be deemed made in New York State or to be governed by the law of that State, then, in the absence of evidence as to that law, I cannot assume that a statute such as Lord Tenterden's Act, our sec. 9 of R. S. O. ch. 146, has been enacted there, and as a verbal contract would have been good but for such enactment, I would have to assume that it is sufficient there now.

Here plaintiff resides in New York State, the negotiations were begun there, and the proofs were discussed and returned there, and the goods were to be delivered there, and were shipped from one point in that State to another.

But, on the other hand, whatever savoured of the making of a contract, such as the discussion and fixing of prices and quantities, was done in Ontario. The fact of the proofs needing revision or return was a mere accident, and the pointing out of defects therein could have been done by any messenger not empowered to contract in any way. Unless, therefore, I am to hold that any act whatever in connection with it done in Buffalo, or such even as the final approval there of the proofs, is to be taken as a recognition and making anew there of the contract, although no terms of it were there discussed, I cannot assume that to have taken place there which did not in fact. No do I think that it makes any difference that upon one of the occasions Mr. Francis Stuart himself, as he stated, attended with the proofs and directed the changes therein.

As in my view the law to be applied is that of Ontario, my judgment must be for defendants dismissing the action, and with costs. Otherwise I would hold plaintiff entitled to $305 and interest from 1st March, 1903, and costs on the High Court scale.

MAGEE, J. JANUARY 5TH, 1907.

TRIAL.

TASKER v. SMITH.

Partition—Action for—Beneficiaries under Trust Deed—Submission to Arbitration—Award—Provision for Option of Purchase—Exercise of Option — Release—Conveyance — Estoppel—Costs.

Action for partition or sale of 6 8-10 acres of land, in which plaintiff claimed a one-fourth interest, and defendant

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three-fourths. They and three others had been beneficiaries under a trust deed of this and other lands held in the name of a trustee. In May, 1902, all the 5 beneficiaries by deed submitted to two arbitrators, the trustee being one, the partition and division between them of the trust estate, with power to the arbitrators to award undivided shares and also to award owelty of partition. On 19th July, 1902, the arbitrators made their award, giving to each of the 5 beneficiaries certain parcels or shares of parcels, plaintiff being allotted certain parcels and one undivided fourth of the land in question here, and defendant certain other parcels and three undivided fourths of this land, and the award directed payment by plaintiff and defendant and one other beneficiary respectively of certain specified sums, to be distributed between the other two beneficiaries. The award contained another clause giving defendant, if she so desired, the right within 6 months from that date to purchase plaintiff's one-fourth interest in the land in question for $375. It was this option which was in question here. Plaintiff contended that it was void as in excess of the arbitrators' authority. Defendant alleged that it was valid, and that she exercised it, and consequently was entitled to the whole of the land, and plaintiff could not have partition.

MAGEE, J.:—It is conceded that defendant did in January, 1903, within 6 months after the award, notify plaintiff in writing of her intention to buy, and tendered the price, $375, and a conveyance for execution, and plaintiff refused to accept the money or execute the deed. Plaintiff asserts that the price is too low, as the land is worth much more than $1,500, although that was the value placed upon it in a list of values agreed upon by all parties shortly before or about the time of the submission as a basis for the partition, which values, however, plaintiff asserts, were only relative and not absolute.

If it were necessary, I would find on the evidence that the land was worth much more than $1,500 at the time of the award.

After the award all the beneficiaries, acting upon it, entered into possession or receipt of rents of the various parcels allotted to them respectively. Subsequently in December, 1904, conveyances were made to each of them by the others and the trustee. The conveyance to plaintiff of her other

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lands and of the undivided one-fourth of this parcel is dated 17th December, 1904, and made between the trustee of the first part, plaintiff of the second part, and defendant and the other three persons interested of the third part. It recites, inter alia, the submission, and that by the award the lands thereinafter mentioned were allotted to plaintiff, and it was adjudged that the parties should join in assurances of the lands allotted, and the parties of the first and third parts, in pursuance of the submission and award and in consideration of the premises and $2, granted to plaintiff in fee simple parcels B. and N. and an undivided one-quarter share or interest in parcel D. (the lands here in question), with and subject to certain rights of way, and as to lot N. certain easements, etc. And the parties of the first and third parts thereby released to the party of the second part all their claims upon the said lands, this release being in the statutory short form, and the deed being declared to be made in pursuance of the Act respecting Short Forms of Conveyances. The conveyance to defendant was by a similar indenture of the same date, the lands allotted to defendant, including the undivided three-fourths of parcel D, being granted to her, plaintiff joining in the grant and also in the release of all claims.

Neither of these documents made any reference to the option to buy given by the award. Both deeds were subsequently registered. Much discussion took place at the trial as to the validity of the direction by the arbitrators that defendant should have the right to buy, and whether, if invalid, it was separable from the rest of the award, or had been accepted and ratified by plaintiff by paying the owelty directed, and taking possession and joining in the conveyance, and also by joining in a release to the trustee dated December, 1904, which recites that the several parties were "satisfied with the application, division, partition, and distribution of the trust estate and premises."

But I am unable to get behind the fact that by the deed to plaintiff of 17th December, 1904, nearly two years after the exercise of the option, defendant not only granted the undivided one-fourth interest but released all her claims thereto in the very comprehensive manner set out in the Short Forms Act, without reserving any right under the option.

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That instrument is not attacked upon the pleadings, and, even if plaintiff had herself given the right to purchase, the conveyance would have put an end to it.

The judgment will declare plaintiff entitled to one undivided fourth of the land, and entitled to have partition or sale thereof, with a reference to the Master for that purpose.

Plaintiff's claim for removal of a barn mentioned in the pleadings was abandoned, as the barn had not been on this land. The purchase money paid into Court by defendant should be repaid to her.

There remains the question of costs. Plaintiff began proceedings for partition or sale by notice under Rule 956, but, in consequence of defendant's claim to purchase, that motion was not granted, plaintiff being directed to bring an action, and the costs to be disposed of in the action.

Defendant should pay plaintiff's costs of this action up till judgment to be taxed upon the ordinary scale, and not as part of the commission provided by Rule 1146. The costs of the motion under Rule 956 and the subsequent costs of this action, including the reference, shall be dealt with as if plaintiff's motion had been granted, and the reference were thereunder and be covered by the provisions of Rule 1146.

FALCONBRIDGE, C.J. JANUARY 5TH, 1907.

TRIAL.

ATTORNEY-GENERAL FOR ONTARIO v. WOODRUFF.

Succession Duties—Valuation of Estate of Deceased Person —Property to be Included—Homestead Conveyed to Son but Deceased Remaining in Occupation—Foreign Bonds Transferable by Delivery and Transferred by Deceased to Sons in Foreign Country.

An action to recover succession duties upon the estate of one Woodruff, deceased.

The deceased resided in St Catharines, Ontario, in 1894, and was the owner of bonds of municipalities in various parts of the United States (lodged with a trust company in New

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York). The deceased handed over the bonds to his 4 sons, who thereupon executed each a trust deed to the United States Trust Company, vesting the bonds in the company in trust to invest and re-invest the same and hold the principal, paying the income to each of the sons for life, and after his death to hold the principal and income for the benefit of children. The bonds were handed over to the trust company, who thereafter transmitted the income to each of the sons half-yearly by cheque. The sons then indorsed the cheques to the father, who put the cheques in his bank account and paid over to the sons $750 each half-yearly until the time of his death.

In 1902 a firm of bankers in New York, who were accustomed to collect the interest on other bonds to the extent of $300,000 and invest the same for the deceased, were directed by the deceased to transfer the account, which stood in his name in their books, to his 4 sons equally, and he gave up the key of the safe deposit box to the sons, who thereafter retained the same in their own possession, and the bankers collected the coupons for the sons and rendered accounts to them to the re-investment, and closed the account of the deceased in their books.

The deceased also executed a deed of the homestead property at St. Catharines, where he lived, to his son H. This deed was said to have been kept by H. in a safe, which he used in common with his father, the son having three separate pigeon holes for his own use. The father paid the taxes during his lifetime, and in 1903 H. moved out of the homestead, where he had lived with his father previously, and lived in another house. The deceased remained in occupation of the homestead until the time of his death.

Plaintiff claimed a declaration that all three items of property were liable to succession duty under sec. 4, sub-secs. a, c, or e, of R. S. O. 1897 ch. 24, and amendments thereto.

The action was tried before FALCONBRIDGE, C.J., at St. Catharines and Toronto.

E. E. A. DuVernet and J. H. Ingersoll, St. Catharines, for plaintiff.

W. Nesbitt, K.C., and H. H. Collier, K.C., for the adult defendants, and Frank Ford, for the infants, did not contend that the homestead should not have been included, for the purposes of valuation, in the inventory of the estate; but con-

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tended that neither of the other items of $300,000 each should have been so included. The property was locally situated in the State of New York, was transferable by delivery, and actually transferred in New York, and was governed by the laws of New York, and was not covered by sec. 4, sub-secs. a, c, or e. Further, even if it were, then under clause 3 of sub-sec. 3 of the Act, it was not property which was intended to be covered in making up the aggregate value of the property of the deceased to $100,000 in value, and unless it came within the description of the property going to make up the aggregate value of the property of the deceased, there were no taxing clauses in the Act applicable to it; no rate imposed, unless it came within that description, and no means of working out the collection of any tax upon it; the imposition of a tax upon such property was a casus omissus under the Act even if the Act was constitutional.

FALCONBRIDGE, C.J. (at the conclusion of the hearing) :— I do not think that during the course of a rather long and very active judicial career I have ever listened with more interest and pleasure to legal arguments than I have experienced in the presentation of the case yesterday and to-day.

Very important matters of principle are debated, and the action itself involves a large amount of money, but I have a view in the case, and I do not know that it is necessary for me to reserve judgment merely for the sake of writing a long opinion.

It is a fortunate thing that I directed the argument that has been presented to be taken down by the stenographer. It will not only be useful for the counsel of the parties hereafter, but I shall be able in dealing with the case and the points generally to refer to the arguments that are presented and say to what extent they embody the conclusions at which I have arrived.

I am not going to pass on the constitutionality of the Act, because I think the matter can be disposed of upon other grounds.

There are various opinions as to the propriety and justice of these Succession Duties Acts. I have had the privilege of hearing two eminent members of our own profession, one upon the Bench and the other not a member of the judiciary, criticize these acts as "legalized robbery." It is unnecessary to say that both these gentlemen were persons whose

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estates might happen to be affected by the operation of the Act. Other people, on the principle cantabit vacuus coram latrone viator, do not view them in exactly the same way.

That, of course, is not material to the investigation here, because we have to administer the law as we find it. But there is this undoubted principle laid down, to adopt the language just cited to me of that very eminent Judge, Lord Justice A. L. Smith, that where the Crown attempts to make out a claim of this sort, it must make its title. In other words, it must shew clearly and explicitly that it has the right, and the taxation ought to be imposed.

Now, I think the arguments presented against the working out of the Act are unanswerable.

Dealing now with the second and third clauses (not the homestead) if it was so intended, which I greatly doubt, I do not think it would extend to this particular property situated in the State of New York, transferable by delivery, and actually transferred in New York and governed by the laws of New York. Even if it were intended, I think it cannot be worked out under the Act, and the Act is defective, for the reasons pointed out in the clear cut argument, not only of Mr. Ford but of Mr. Nesbitt.

It is, I should think, undoubtedly a casus omissus. I do not think it is necessary to elaborate the matter further.

It is practically conceded that with reference to the homestead, the Attorney-General must succeed. The plaintiff will have leave, if he thinks proper, to add the United States Trust Company as a party defendant, whatever that may involve in the way of new pleadings or new argument. The plaintiff has, for whatever it is worth, that leave.

The finding, therefore, of the Court will be that the homestead property of the testator was wrongfully omitted from the affidavit of value, and that the other assets and property were not wrongfully, but rightfully, omitted.

The result is that the Crown so far takes nothing under the Act, and therefore, although the plaintiff has succeeded on one minor point, defendants are entitled to their costs. The battle has not raged at all over that portion of the field, as to the homestead, but with reference to the other two questions.

That therefore will be the judgment of the Court, with 30 days' stay.

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I should have said, perhaps, in the view I have taken of the case, that the intention and motives of the testator and his sons (the testator at any rate) are not in issue.

JANUARY 5TH, 1907.

DIVISIONAL COURT.

MOIR v. CANADIAN PACIFIC R. W. CO.

Railway—Injury to and Consequent Death of Person Crossing Track — Negligence — Failure to Give Warning of Approach of Train—Findings of Jury — Admission of Deceased that he Ran into Train.

Action by Forbes Moir to recover damages for the death of his son Byron, by the alleged negligence of defendants in running one of their trains across a highway in the township of Garafraxa.

Byron Moir was 18 years old at the time of his death, and had been working for his father on a farm in Garafraxa for the previous 6 years. Defendants' railway runs east and west through plaintiff's farm; in coming from plaintiff's house to the crossing there is nothing to obstruct the view of the railway track for a considerable distance in either direction. From the house to the track there is a down grade, which becomes very slight 40 or 50 feet from the track.

The moving train was due to leave Elora at 8.40 and run north-west through Fergus, the next station being Spires, a flag station, and the next Bellwood, 3 miles west of Spires, and was due to cross the concession line between the 4th and 5th concessions at plaintiff's farm, which is between Fergus and Spires, 3 or 4 minutes before 9 o'clock. It was 8 minutes late leaving Elora on the morning in question.

Plaintiff went out of his house that morning, and before doing so looked at the clock and saw it was between 10 and 15 minutes after 9, and he concluded that the train must have passed without any one noticing it. In 2 or 3 minutes he heard a long whistle, denoting a whistle for a station, and, from the direction he thought the sound came from, concluded it was for Bellwood station, distant 3 miles to the

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north-west, and therefore thought the train had passed over the concession line at his farm. The whistle he heard was, however, to the south-east, as there was no other train on the line, and it passed across the concession line going west a few minutes after. Shortly after this, his son Byron, who intended going to a farm owned by plaintiff across the railway track, asked his father if the train had passed, and his father replied that it must have passed, as it was nearly 15 minutes past 9 when he left the house. Byron then went into the house, and soon afterwards left it, with his brother James, a lad of 12, to cross over the railway track. A few minutes after Byron had left, plaintiff was standing near the barn, when he heard the train rush eastward through the mist, but he heard no whistle or bell. The whistling post is 80 rods east of the crossing, and the whistle for the crossing, he said, is 4 sharp blasts. According to plaintiff's evidence, the morning was foggy.

James returned to the house and told plaintiff that an accident had happened. Plaintiff at once went to the crossing, where he found Byron on the eastern half of the highway, about 10 feet from the north rail of the track. He was taken home, and remained perfectly conscious until just before his death on 28th December.

The deceased told the physician who attended him that he and his brother were trotting down the hill to the other farm, that it was a very misty morning, and the smoke blew back on that side of the train, and with the smoke and the mist behind he could not see the train, and ran into it and got struck by it.

According to the statement of the deceased made to his father, he was some yards from the track when he heard the noise of the train and the steam from the engine as it passed, but was unable to stop and was struck by the step of the last coach.

The train consisted of the engine and tender, a baggage car, and two passenger coaches.

It was found when the train reached Bellwood or Orton station, either 3 or 8 miles from where the accident happened, that it was the rear step of the last coach which must have struck deceased, as a piece of the step had been split off.

The following were the questions submitted to the jury, with their answers:—.

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1. Were defendants guilty of negligence? A. Yes.

2. If so, in what did the negligence consist? A. By not giving proper warning, the blowing of the whistle 80 rods distant from the crossing of the public highway and the continuous ringing of bell until the engine had crossed the highway where the accident occurred.

3. If defendants were negligent, was the injury to deceased caused by their negligence? A. Yes.

4. Was deceased guilty of negligence? A. No.

5. If so, in what did the negligence consist?

6. Could deceased by the exercise of reasonable care have avoided the accident? A. No, according to the evidence submitted.

7. At what sum do you assess plaintiff's damages? A. $2,000.

Judgment was entered for plaintiff by the trial Judge, and defendants appealed.

The appeal was heard by MEREDITH, C.J., MACMAHON, J., TEETZEL, J.

Angus MacMurchy, for defendants.

M. J. O'Reilly, Hamilton, for plaintiff.

MEREDITH, C.J.:— . . . I am unable to come to the conclusion that the only inference that reasonably could be drawn by the jury was that deceased's injury and subsequent death were not the proximate result of the negligence of which defendants' servants were, according to the finding of the jury, guilty in passing over the highway crossing without giving the warning of the approach of the train which, under the provisions of the Railway Act, it was their duty to give.

The jury, having found that the prescribed statutory warning was not given, might well have reached the conclusion that the deceased was in effect told by defendants that there was no train approaching which had reached a point nearer than 80 rods from the crossing, and that, as the line was one upon which no other train than the passenger one which caused the injury to deceased ran at or near the time when this train passed over the crossing, even if the deceased and his brother were running down the hill to the crossing at such a speed that when the deceased suddenly became

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aware that a train was crossing he was unable to stop in time to prevent coming into collision with the train, that was not a negligent act constituting contributory negligence on his part, or one which severed the causal connection between the negligent act of defendants' servants and the injury to the deceased.

It may be that this was the view taken by the jury as to the way in which the accident happened, and, if it was, I am unable to say that it was so unreasonable a view that their findings ought to be set aside.

It was, no doubt, open to the jury to have found that the injury to the deceased was not caused in the way suggested, but that he might have stopped before coming to the track, had he chosen to do so, and that he knew that a train was passing over the crossing, and was injured owing to his having attempted to cross over the track before the train had got over the crossing, misjudging on that hypothesis the length of the train. If that had been the fact as found, or the only reasonable conclusion to be drawn from the testimony, there would be difficulty in the way of plaintiff succeeding, but it must, I think, be assumed that the jury negatived this theory and adopted the other with which I have dealt.

Though one might have been better satisfied if the findings of the jury had been the other way, I am unable to say that the findings they have made should be set aside, and the result is that, in my opinion, the judgment should be affirmed and the appeal dismissed with costs.

TEETZEL, J., gave reasons in writing for the same conclusion.

MACMAHON, J., after an elaborate statement of the facts, from which the particulars above given are taken, expressed the opinion that on the admission made by the deceased that he heard the train coming and did not stop or could not stop, and as a consequence ran into the train, there was nothing to leave to the jury, and the motion for a nonsuit should have prevailed.

Appeal dismissed with costs, MACMAHON, J., dissenting.

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MAGEE, J. JANUARY 7TH, 1907.

MACKENZIE v. WADSON.

Assessment and Taxes—Tax Sale—Defect in Proceedings—Failure to Notify Owners of Liability of Lands to Sale—Other Omissions—Declaration that Sale Void—Lien of Purchaser for Purchase Money and Subsequent Taxes.

Action to declare illegal and void a sale for taxes of lot 12 in concession C. in the township of Paipoonge, in Thunder Bay district, containing 79 acres more or less, and a conveyance thereof to defendant made in pursuance of such sale.

MAGEE, J.: — The statement of claim alleges that the plaintiffs the Canadian Northern Railway Company are owners of 6.89 acres of the lot, and the other plaintiffs, who constitute the firm of Mackenzie & Mann, own the residue. The plaintiffs' title is admitted at the date of the tax sale, 3rd November, 1903. The fact of a tax sale on that date to one Alfred Sandberg, the assignment by Sandberg of his interest to plaintiffs, and the deed to plaintiffs, are also admitted, as is also the fact that the sale was duly advertised. The tax deed is dated 4th March, 1905, and was registered on 17th March, 1905. The sale was assumed to be made for alleged taxes of the years 1900-1-2.

Paipoonge township formed part of the municipality of Neebing, which was originally constituted in 1881 by 44 Vict. ch. 43; and by 55 Vict. ch. 76 the township constituted the ward of Paipoonge in Neebing. By 49 Vict. ch. 60, sec. 1, the municipality was to be governed by the provisions of the Municipal Act and the Assessment Act, and by sec. 10 the arrears of taxes were to be collected as in counties and the reeve and treasurer were to perform the like duties as the warden and treasurer in counties, and the provisions as to sales for taxes and deeds therefor were to apply to Neebing.

On 26th April, 1904, by 4 Edw. VII. ch. 61, Paipoonge was separated from Neebing and made a municipality, and by sec. 10 of that Act all assessment rolls of Neebing theretofore finally revised and all collectors' rolls and collectors' returns theretofore made were validated and confirmed. On 30th April, 1900, by 63 Vict. ch. 94, all assessment rolls of Neebing theretofore finally revised were declared valid, but that Act would be too early to effect the roll of that year.

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As in Kennan v. Turner, 5 O. L. R. 560, 2 O. W. R. 239, the onus of proof of the invalidity of the defendants' tax title rests on the plaintiff. It is not attempted to be proved or suggested that any of the taxes for which the sale was made were paid.

The assessment roll for 1900 is not produced. It is said it was probably destroyed with other municipal papers in a fire at the town hall in Fort William. Those for 1901 and 1902 are produced, in which this lot is assessed to "Mackenzie & Mann, Port Arthur, contractors," as freeholders. No part of the lot was assessed in any of the three years to the Canadian Northern Railway Company. Mr. Piper, the assessor for 1901 and 1902, says that he sent notices of assessment each year to Mackenzie & Mann, in care of the agent of the Canadian Northern Railway Company at Port Arthur, as he supposed they owned that railway. There is no evidence that the notices did not reach them.

The collectors' rolls for 1900-1-2 are produced, shewing under name of party assessed "Mackenzie & Mann," and the address as Toronto in 1900, and Port Arthur in 1901 and 1902, and the amount of taxes in 1900, $3.20, and in 1901, $3.20, with $3.52 arrears, making $6.72, and in 1902, $3.20, with $7.39 arrears, making $10.59. In each the detailed amounts for the several rates making up $3.20 are given, and the amount of assessed value stated at $160.

A list of lands in Paipoonge "liable to be sold for arrears of taxes in the year 1903" was made out and signed by the treasurer addressed to the clerk. This lot 12 is entered in it as being in arrear for 1900-1-2. The list is dated 28th February, 1903, and on it is indorsed a certificate affirmed by the assessor before the clerk on 30th April, to the effect of the form in sec. 154. There are no names or entries made by the assessor. His certificate states that he has examined all the lots in the list and entered the names of all occupants as well as the names of the owners where known.

The list was given by the treasurer to the assessor to be delivered to the clerk who lived near him. The clerk says he received it from the assessor but only once. That would probably be about the date of the affirmation or later, as the clerk says it was after the assessor had performed his duties. He says he kept it on file a short time. Subsequently it was given to the treasurer. Thus the original list was made to do duty for the three officers instead of the copies prescribed by sec. 153 and sec. 159. This would probably answer all

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practical purposes except the requirement of sec. 153 that the treasurer's original list and the assessor's original return should be kept by the clerk on file in his office. It does not appear, however, that any inquiry for either was ever made by any one at the clerk's office or that any prejudice resulted to plaintiffs from their absence. The treasurer says no one inquired of him in 1903 as to arrears on this lot.

As to what the assessor did in compliance with sec. 153, there is nothing to shew beyond his certificate on the treasurer's list. It states that he had examined all the lots in the list and entered the names of all occupants thereon, as well as the names of the owners thereof when known. As no entries are made by him on the list as to this lot 12, the implication is that he did not send to the owners any notice of the liability of their lands for sale.

Reading sec. 153, as amended by 62 Vict. (2) ch. 27, sec. 12, with sec. 154 and sec. 51, I think the legislature intended that the owners, if known, should be notified by the assessor of their danger, whether or not he found the lands occupied or built upon.

The assessor for 1903 had also been assessor in 1901 and 1902. In both those two previous years he has assessed this lot 12 to Mackenzie & Mann as freeholders, and had sent them notices of assessment as already mentioned. He had no reason to suppose there was any change, and it does not appear that any change in the persons assessed was made in 1903; no evidence was offered as to that. I therefore assume that before he made the certificate on the treasurer's list in 1903, he did know the owners and did not send them notice.

The clerk admits that he did not, as required by sec. 155, examine the assessment roll of 1903 to see what lots in the treasurer's list were occupied or built upon, so that the arrears might be put upon the collector's roll for that year before being advertised for sale. Possibly his omission made no difference in this instance, as the 1903 assessment roll is not produced to shew what is contained.

Under sec. 147 the collector is to furnish the clerk each year with a duplicate of the account sent to the treasurer of uncollected taxes, and the clerk is to mail a notice to each person appearing on the roll. The clerk says that in 1903 he received from the treasurer a list of 188 lots upon which there were arrears, and he sent out 188 notices. The list is not produced, but the treasurer says it included the lands liable to sale, and he says it was given to the clerk in Janu-

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ary, whereas the clerk could not tell what time of year he received it. Assuming notice to have been sent to Mackenzie & Mann by the clerk of the taxes for 1902 being unpaid, the notice cannot be assumed to have specially called their attention to the liability to sale.

The warrant to the treasurer to levy is dated 2nd July, 1903. The sale was made by the treasurer of Neebing before the separation of Paipoonge. The deed to defendant was made by the reeve and treasurer of Neebing after the separation. No objection was made on that ground.

The substantial defect in the proceedings previous to the sale was the failure of the assessor to notify the owners under sec. 153 of the liability to sale. That defect was very fully dealt with in Deverill v. Coe, 11 O. R. 222, and held to be fatal.

Whether the other omissions, which, though contrary to the Act, have not in this case, so far as appears, worked actual injury, would invalidate the sale, it is not necessary to discuss: see Kennan v. Turner, 5 O. L. R. 560, 2 O. W. R. 239; Boland v. City of Toronto, 32 O. R. 358, and cases there referred to.

The judgment will be for plaintiffs declaring the tax sale and conveyance to be void, but under sec. 218 defendant will be declared to have a lien for the purchase money and taxes subsequently paid by him, with interest as provided by that section, the amount to be settled by the local registrar in case of difference, and with liberty to apply for its enforcement if not paid. The defendant must pay the costs.

CARTWRIGHT, MASTER. JANUARY 8TH, 1907.

CHAMBERS.

GRAND TRUNK R. W. CO. v. CITY OF TORONTO.

Summary Judgment—Rule 603—Delay in Moving—Defence to Action.

Motion by plaintiffs for summary judgment under Rule 603 in an action to recover a proportion of the cost of maintaining gates and watchmen at certain railway crossings in the city of Toronto.

D. L. McCarthy, for plaintiffs.

W. Johnston, for defendants.

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THE MASTER:—The writ of summons was served on 10th October, and an appearance was entered on 12th October. The present motion was launched only on 3rd January instant. The delay was not explained. This brings the case within the decision in German American Bank v. Keystone Sugar Co., 8 O. W. R. 634, and the motion must be dismissed.

In any case, considering the parties and that plaintiffs, if ultimately successful, are in no peril of losing either debt or costs, it seems better to allow defendants to have the opportunity of attempting to free themselves, either in whole or in part, from a perpetual charge of over $3,000 a year.

Defendants should in every way facilitate the trial and waive the three weeks given in Rule 542 (4), as in the present case this will be merely a formal step in an attempt to obtain a hearing before the Privy Council, in spite of their previous refusal to allow an appeal from the adverse decision of the Supreme Court on the same point.

Costs in the cause.

CARTWRIGHT, MASTER. JANUARY 8TH, 1907.

CHAMBERS.

ORR v. TORONTO R. W. CO.

Discovery—Production of Documents—Affidavit—Claim of Privilege—Reports Obtained for Solicitor in Contemplation of Possible Litigation.

Motion by plaintiffs for a better and further affidavit on production of documents by defendants.

E. Bayly, for plaintiffs.

J. F. McCarthy, for defendants.

THE MASTER:—The affidavit is on the printed form which is always used by defendants. The second part of schedule 1 consists of the reports of the motorman and conductor made on the day of the injury on account of which the action is brought. As to these the 5th paragraph of the affidavit says "that the said reports are confidential and made for the purpose of obtaining legal advice from the solicitors

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for the defendant company in contemplation of possible litigation, and are privileged."

It was contended that this is too vague, and it was argued that Mr. Bray had not fully appreciated the effect of the decisions on which he relies for the statements in paragraphs 53 and 54 of his (1904) Digest of the Law of Discovery. I have looked at the cases submitted, and am unable to see any ground for imputing errors to the learned author. At p. 32 he notes the cases chiefly relied on by Mr. Bayly, and points out that in the later case of Collins v. London General Omnibus Co., 68 L. T. 831, "a report of this nature made for no other purpose than for the use of the company's solicitor in anticipation of litigation was held privileged if made under a reasonable apprehension of an action or claim against the company." The words here, "in contemplation of possible litigation," are surely equivalent to the words quoted above. It has been stated that something like 10 claims a day are made on defendants for damages alleged to have been caused by their negligence, so that in every case of accident they may well be under a reasonable apprehension of action.

I would refer also to . . . Hunter v. Grand Trunk R. W. Co., 16 P. R. 385; Thomson v. Maryland Casualty Co., 7 O. W. R. 15.

Motion dismissed with costs to defendants in any event.

In the Collins case, supra, Cook v. Metropolitan Tramways Co., 6 Times L. R. 22, was commented on and distinguished.

JANUARY 8TH, 1907.

DIVISIONAL COURT.

ENGELAND v. MITCHELL.

Discovery—Production of Documents — Affidavit — Master and Servant—Agreement to Share Profits—Master and Servant Act, sec. 3—Statement Furnished by Master—Production of Books—Postponement of Discovery—Impeachment of Statement of Fraud.

Appeal by plaintiffs from order of MEREDITH, C.J., in Chambers, reversing order of local Judge at Guelph, requiring

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defendant Mitchell to file a better affidavit on production and produce the books of his business in an action for an account of the 6th year's business of defendants under an agreement with plaintiffs giving them a share in the profits, the action being similar to that of Cutten v. Mitchell, 10 O. L. R. 734, 6 O. W. R. 497, 552, 629, which was in respect of the first 5 years' profits.

W. H. Cutten, Guelph, for plaintiffs.

H. Guthrie, K.C., for defendant Mitchell, contended that plaintiffs were not entitled to discovery of the books, having regard to the language of sec. 3 of R. S. O. 1897 ch. 157. until they had established some fraud at the least.

The judgment of the Court (BOYD, C., MACLAREN, J.A., MABEE, J.), was delivered by

BOYD, C.:—It is undesirable upon interlocutory applications such as this, in respect of an affidavit for better production, to decide the important questions of law which were raised upon the pleadings. First, it is in dispute whether the verbal agreement alleged as to the sharing of profits is or is not within the scope of R. S. O. ch. 157, secs. 3 and 4. That matter has been apparently determined adversely to plaintiffs in the former action of Cutten v. Mitchell, 10 O. L. R. 734, upon the same agreement, but not perhaps so definitely as to amount to an estoppel or res judicata.

And again, if the agreement is covered by the statute, it is still questioned whether there is the right to investigate or impeach the statement of profits declared by the defendants, by reason of the statute declaring that such statement is final and conclusive between the parties and shall not be impeachable upon any ground whatever. It was thought by the Judge of first instance, in the earlier action referred to, that the statute may be questioned on the ground of fraud, but the Divisional Court did not adopt that view of the law, and the point is one still open for adjudication in a more satisfactory way, as upon a demurrer, than upon interlocutory motion.

In a case before me at London, Formularo v. Forest City Laundry Co. (p. 82, note book of 1906), I ruled off-hand that the statute might be attacked upon grounds of fraud or error, but upon appeal a Divisional Court (15th June, 1906) did not apparently accept that view, although giving leave

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to amend as the plaintiff might be advised. The plaintiff amended, I am told, by setting up fraud and mistake, and the case was tried out on these grounds—but without any profitable result. This case, therefore, is not binding upon us, and I now am not satisfied that my ruling can be maintained in the face of the statutory language, to which my attention was not directed at London.

The question as to the conclusiveness of this statement was not discussed before us on this appeal; it was perhaps not entered into by the appellant because his contention is that the statute does not apply to his contract. Both of these points of law should be decided, not indirectly as on this point of practice, but should be raised so as to be capable of being determined by a Court of ultimate appeal—i.e., presented and argued as matters of law upon the record.

My view is at present that the agreement is within the statute, and, if so, that a further and better affidavit should not be ordered as of course, even if at all. In my opinion, the better practice would be to let this matter of further discovery be held till the trial of the cause, and then such a course could be taken to ensure justice as is indicated in Turner v. Bailey, 4 DeG. J. & S. 332, and its sequel before the Master of the Rolls as reported in 34 Beav. 105.

I would affirm this order of the Chief Justice with costs in the cause.

The brief result of this appeal is that further production is not absolutely denied, but the consideration of the matter is postponed till it has been properly determined in this action: (1) whether the agreement set up is within the Ontario statute; and (2) whether (if it is) the statement of profits declared by the defendants can be impeached for fraud, error, mistake, or other like cause.

CARTWRIGHT, MASTER. JANUARY 9TH, 1907.

CHAMBERS

DUNN v. McCALLUM.

Mechanics' Liens—Lis Pendens—Lien of Material Man—One Claim against Lands of three Owners.

Motion by defendants the owners, in a mechanic's lien action, to vacate the registry of a certificate of lis pendens.

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E. A. Forster, for applicants.

J. Bicknell, K.C., for plaintiff.

THE MASTER:—In this case the owners of three adjoining parcels made separate contracts with defendants McCallum & Campbell to erect houses on their respective properties.

The statement of claim sets out that plaintiff furnished to the contractors, McCallum & Campbell, materials for those houses, amounting in all to $280, for which he has not been paid. He therefore brought his action and registered a lis pendens against all the lands jointly for the whole amount.

The owners contend that this cannot be done, and have moved to have the certificate of lis pendens vacated.

The question is really one of the construction of sec. 7, compared with sec. 18, of the Mechanics' Lien Act, which says: "A claim for lien may include claims against any number of properties."

Mr. Holmested, in the last edition of his valuable work, at p. 103, doubts if it can "be intended to apply to the case of liens claimed by a person on different lots owned by different owners." But no authority is given, nor was any cited on the argument, since the last revision of the statutes. For the motion reference was made to Oldfield v. Barbour, 12 P. R. 554, and Currier v. Friedrich, 22 Gr. 243. These cases are cited by Mr. Holmested (at p. 48) as shewing that in a case such as the present the lien should at least shew how much is claimed against each parcel separately.

Section 18 may have overruled Currier v. Friedrich, supra. But in view of the language and reasoning in Oldfield v. Barbour, supra, it does not seem possible to uphold the lien in the present case without express legislation to that effect. In the latter case, Mr. Dalton said (p. 555): "How can it possibly be maintained that it is right to charge against one man's land a claim for services performed on the property of another man? It is against natural justice. There is no judicial authority for such a view."

The difficulties of persons in the position of the plaintiff were forcibly put by Mr. Bicknell. But the rights of the owners are also to be considered. As Mr. Dalton pointed out in the Oldfield case, "there may easily be a case not

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within the statute at all," because "it would be impossible for the workman to affix his claim on any property or owner in particular." Booth v. Booth, 3 O. L. R. 294, 1 O. W. R. 49, may be found useful. See p. 296 of 3 O. L. R., which shews that a separate account should be kept in these cases if the Act is intended to be invoked.

The order will issue, but without costs, as the point is new, and the applicants do not press for costs. Where one of two innocent persons must suffer, the loss must fall on the one who has caused the difficulty.

CARTWRIGHT, MASTER. JANUARY 9TH, 1907.

CHAMBERS.

PRINGLE v. WALLER.

Default Judgment—Defence—Account—Setting aside Judgment—Terms—Costs.

Motion by defendant Ryan to set aside judgment for default of appearance entered by plaintiff.

T. F. Slattery, for defendant Ryan.

R. U. McPherson, for plaintiff.

THE MASTER:—The whole amount claimed in the writ for goods supplied to the defendant firm is $303.77. Of this $103.77 is admitted and has been paid. This sum is the apparent balance claimed on the bill of 23rd July . . . when defendants had sold out to a firm of Ryan & McCall, who, it is said, were to assume defendants' liabilities. The bills rendered to the new firm down to 19th November are consistent with defendants' contention that the $90 and $110 should go to the credit of the old firm. Plaintiff now says that the credits of $90 and $110 given to defendants . . . were payments of the new firm, and should have been credited to them. He admits, however, . . . that at the time he intended to credit the $90 to defendants, though not the $110.

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Plaintiff may in the end establish his contention, and recover this $200 from defendants. I think, however, that the judgment should be vacated as in Dobie v. Lemon, 12 P. R. 64, and on the same terms as to costs.

Plaintiff does not seem very proficient in accounts, and no doubt this has caused the present difficulty, which raises a distinct issue.

Defendants should in every way facilitate the trial, and agree to its being brought on at the earliest possible date.

The depositions of both parties should, if possible, be used for discovery. If this can be done, it should be so stated in the order.

JANUARY 9TH, 1907.

DIVISIONAL COURT.

MURPHY v. MURPHY.

Promissory Notes—Accommodation Notes Given for Specific Purpose — Extent of Liability of Makers — Notice to Holders—Limited Security—Memorandum of Hypothecation—Account—Continuing Security—Interest—Costs.

Appeal by plaintiffs from judgment of CLUTE, J., dismissing action upon three promissory notes, dated 4th December, 1901, for $1,000 each, made by defendants James Murphy and James Quinn to the order of Patrick Murphy, and indorsed over by Patrick to plaintiffs, a partnership carrying on a banking business in the village of Tweed.

E. G. Porter, Belleville, and M. Wright, Belleville, for plaintiffs.

W. M. Douglas, K.C., for defendants.

The judgment of the Court (BOYD, C., MACLAREN, J.A., MABEE, J.), was delivered by

BOYD, C.:—It appears to me that the conclusions of the trial Judge are unimpeachable down to the point of this judgment when he finds that $488 was paid out of advances

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by the bank of the plaintiffs in order to satisfy the claims of the cheese patrons in full for the year 1901.

There is no reasonable doubt that the defendants gave the three notes sued on without consideration and for the accommodation of Patrick Murphy, president and salesman of the cheese company, so far as to enable him by their indorsement to plaintiffs to meet and satisfy all the current claims of the cheese patrons for the year 1901. The security was given on this limited condition, and it was received by plaintiffs on that footing and with that knowledge. There was an attempt afterwards made to enlarge the scope of the security by means of the memorandum of hypothecation, but that was an incomplete document, and it was signed by Patrick without any authority from the sureties so to enlarge their liability, and, so far as defendants are concerned, I regard this paper as entirely nugatory.

The true basis of defendants' liability is to be ascertained on a true account of the dealings in the year 1901, subsequent to the giving of the notes, and that is found in the analysis of Mr. Spence, of which the trial Judge has approved. For that year's dealings these notes, or rather the first of the series, was drawn upon to the extent of $488. That is the measure of the liability of the sureties at its highest.

I, however, cannot follow the judgment in finding that this amount was afterwards wiped out or paid by the dealings in the next year, 1902. It is not fair to take moneys paid in to the cheese factory account of 1902, which represent the product of sales to be accounted for to the patrons of that year (according to the quantity of material supplied by each), and apply any part of that money to pay a debt of the previous year. Each year of the cheese factory business stands by itself. The earnings of the year were to be divided at the end of the year, and one year cannot answer for another. To give the defendants the benefit of their contention that the security was limited to the one year's operations, 1901, it is necessary to end the account with the state of affairs as they stood at the year's end, and at that point their security had been availed of by Patrick to the extent of $448, which has not been paid off or settled, and it still remains as an outstanding claim by plaintiffs.

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The plaintiffs, in their way of keeping accounts and treating the notes as a general and continuing security, carried in the cheese moneys to the bank account so as apparently to discharge this $448, but this manner of accounting is erroneous, when the true nature of the security is ascertained. It would be a breach of trust to apply the cheese moneys of 1902 to clear off a cheese money debt of 1901.

I think judgment should be entered on the first note for $448, and costs on County Court scale. The rest of the claim should be dismissed with costs. There should be no interest on the $448, as the amount has not been ascertained till now in the action.

As to the appeal, the plaintiffs should pay two-thirds of the costs, and these and the other costs coming to the defendants to be set off against the $448 and County Court costs—and payment made according to the result.

JANUARY 9TH, 1907.

DIVISIONAL COURT.

DOMINION PAVING AND CONSTRUCTION CO v. CITY OF TORONTO.

Building Contract—Work and Labour and Materials—Extras—Action for Price—Building Erected for Municipal Corporation—Authority of Architects — Decision as to Necessity for Extra Work—Quantum Meruit—Pleading—Amendment—Evidence Adduced on Appeal.

Appeal by defendants from judgment of MEREDITH, C.J., in favour of plaintiffs for the recovery of $387.48 in an action for work done by plaintiffs for defendants on the St. Lawrence market building, over and above the work which plaintiffs contracted to do, upon the order of defendants' architects, as alleged.

J. S. Fullerton, K.C., and F. R. MacKelcan, for defendants.

W. H. Irving, for plaintiffs.

The judgment of the Court (FALCONBRIDGE, C.J., BRITTON, J., RIDDELL, J.), was delivered by

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RIDDELL, J.:—. . . The statement of claim alleged that while defendants were erecting the St. Lawrence market, their architects directed plaintiffs to do certain work, which they did, and that defendants obtained the benefit of this work; and that defendants were therefore liable to pay for the same. This pleading being delivered on 1st September, 1906, a statement of defence was delivered on 6th September, setting up that the work was not done under the direction of the architects, and if it was, the architects had no authority so to direct.

This pleading was delivered while the counsel for defendants was absent from the city. Upon his reurn and before the trial, he caused notice to be served upon the solicitor for plaintiffs for an amendment to the statement of defence, setting up that the work in question was done under a written contract, and that under the terms of this contract plaintiffs were not entitled to remuneration. This notice seems to have been lost sight of at the trial until the trial Judge had given his decision, when the following took place:—

"Mr. Fullerton: Would your Lordship allow a reference as to the amount? I served my learned friend with a notice of an amendment to the statement of claim.

"His Lordship: If it is to set up this defence, I refuse it as far as I have power. . . .

"Mr. Fullerton calls my attention to the fact that he has given notice of a motion for leave to amend by setting up the terms of a special contract as an answer to the action. I think it would not be in furtherance of justice that defendants should be permitted to get rid of what I think is an honest claim by sheltering themselves behind the conditions of this contract. I therefore, although the right to amend is very wide, decline to permit the amendment. But I have dealt with the case as if the amendment were upon the record, and if it were there the result would be as I indicate."

During the course of the trial counsel for plaintiffs had put in the contract. When the manager of the plaintiffs was giving evidence—

"Mr. Irving: I am not basing my claims upon the contract. I am referring to the contract now—I am putting in

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the contract at this stage for the purpose of shewing that Mr. Jarvis was the architect under the contract.

"His Lordship: If it is in, it will be in for all purposes."

It may be that it was not necessary, that defendants did not, under these circumstances, require an amendment to take full advantage of the terms of the contract. This was much discussed in the case in the Supreme Court of Lake Erie and Detroit River R. W. Co. v. Sales, 26 S. C. R. 663, but no note appears of the argument upon this point; the judgment will be found pp. 668 et seq.

If, however, it was necessary that an amendment should be made to enable defendants to take advantage of the contract, such an amendment should have been allowed. Notwithstanding certain dicta and decisions in England, I think no better rule can be laid down than that of Lord Esher, M.R., in Steward v. North Metropolitan Tramways Co., 16 Q. B. D. 556: "However negligent or careless may have been the first omission, and however late the proposed amendment, the amendment should be allowed, if it can be made without injustice to the other side. There is no injustice if the other side can be compensated by costs." This rule, adopted as it has been by this Divisional Court and by the Court of Appeal in Williams v. Leonard, 16 P. R. 544, and 17 P. R. 73, has been acted upon continuously in our Courts—it is a reasonable rule and should have been applied in the present instance.

Counsel informs us that no evidence would have been given had the amendment been allowed which had not been given. The amendment, then, will be allowed, and at the same time, of course, any amendment that may be necessary to set out the actual facts as disclosed in evidence may be made in plaintiffs' pleadings.

It will be seen that the Chief Justice found as follows: "My conclusion upon the evidence and upon the documents is that none of the work for which plaintiffs are suing was work provided for by the contract, and that none of it is to be treated as extras requiring, as Mr. Fullerton contends, according to the terms of the contract, the prior order of the architect and the chairman of the property committee. I think this was work outside of the contract altogether—work that was necessary for the purpose of making the market fit to be used. The architect, exercising the best

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judgment, having determined, rightly, I think, that this work was not within the contract, directed the contractor to go on."

When it was urged by Mr. Fullerton that there was no evidence to support this finding, Mr. Irving stated that at the trial it had been agreed both that the claim was for work entirely outside of and disconnected with plaintiffs' contract, plans, and specifications, and that the architects had so decided. This was not admitted at any time by Mr. Fullerton, but he before the conclusion of the case strenuously denied any such admission. Mr. Irving informed us that, had such admission not been made, the architects, who were present at the trial, would have been called to prove these facts. In this state of affairs, it seemed to us that we might have to send the case back for a new trial or send the case to a reference with a declaration of the law applicable thereto (either of which courses would entail useless expense and delay), or that we might exercise the powers given by Con. Rule 498 and ourselves examine the architects upon these questions of fact. We thought that the cheapest and most expeditious course was the last named. Upon notifying counsel of the course we intended to pursue, I do not understand that any objection was taken by either counsel, though counsel for defendants desired to open up certain accounts. This we thought not necessary.

The two architects being brought before the Court, they were examined by a member of the Court, and questions suggested by counsel for plaintiffs were also submitted. Counsel for defendants did not suggest any question.

It was objected by counsel for defendants that there was no pleading enabling plaintiffs to claim under the contract. This I do not think well founded. The statement of claim alleges: "3. Acting for and on behalf of the said defendant corporation, the said architects or one of them ordered the plaintiff company to do certain work," etc. I do not think it was necessary to allege specifically that the authority of the architects were derived from the contract—if it be necessary, an amendment may be made, especially as the contract was put in by Mr. Irving at the trial for that purpose, and while it was said at the trial by counsel for plaintiffs that he was not basing his claim upon the contract, that does not mean more than that he did not allege that

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the work sued for was mentioned in the contract; if it means more, we do not hold the clients bound by a mistake of that character made by counsel.

The evidence of the architects makes abundantly clear what it is said was admitted at the trial, namely, that the work sued for was not within the plans and specifications at all, that it did not result from any alteration in the plans and specifications, that it was ordered by the architects, and that the architects decided that the work was outside the plans and specifications, not caused by any alterations in the same, but was a mere addition in no wise affecting or relating to anything contained in the contract of the plaintiffs or the plans and specifications thereof.

Meagre as is the evidence at the trial, I think, even without the evidence given before us, from an examination of the plans and specifications and other documents put in at the trial, we may find that the decision of the learned trial Judge should be sustained. The evidence before us places this beyond a shadow of doubt.

I do not think it necessary to decide whether, irrespective of the contract, the architects had the power to order the contractors to do the work in question and thereby bind defendants to pay for the same. The cases cited do not bear out this contention so vigorously urged upon us: Pim v. County of Ontario, 9 C. P. 304; Green v. Township of Orford, 15 O. R. 506, 16 A. R. 506. But I refrain from expressing any opinion.

The case, in my view, is reduced down to this. Plaintiffs are contractors for defendants under the written contract put in, the authority of the architects is to be found in this contract, and the rights of the parties governed by the provisions of the contract. I think that the trial Judge is right when he finds that, even were the contract properly pleaded, plaintiffs are entitled to recover.

Reliance is placed by defendants upon clauses 7 and 10 of the contract. . . . No provision is made for payment of additions not being additional work required in alterations. The authority given to the architect, however, is clear: "Should the said architect at any time . . . require any . . . additions to the said plans and specifications, he shall have the right and power to make such change or changes." And where no provision is otherwise made for

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remuneration to the contractors for doing work required by the architect acting under this express power, the contractors must be entitled to payment. . . .

We were told that the judgment of the Supreme Court of Canada in City of Toronto v. Metallic Roofing Co., not reported, has interpreted the contract in the sense insisted upon by defendants. A careful examination of the proceedings convinces me that this is not so. . . . I think that the Supreme Court has passed no opinion upon the matter now under consideration, and I think that additions that may be made to the work as originally contemplated, and not a mere alteration in the original plan, may be directed by the architect—that such direction need not be in writing—that it may be without reference to the chairman of the board—that such a direction must be obeyed by the contractor—and that work done of this character under such direction may be recovered for from defendants. . . .

The question whether there must be an adjudication by the architects before action, both as to whether the work be an addition and as to its price under sec. 10 of the contract, has become immaterial. If it be necessary, then such a decision has undoubtedly been made. I agree with the trial Judge in thinking this decision entirely right. Plaintiffs are entitled either to the amount decided by the architects to be due or to a quantum meruit—and that upon the evidence before us is the same sum. If there be any real dispute as to the proper value, defendants may at their own expense take a reference to determine the value, in which case further directions and costs will be reserved. If not, the appeal will be dismissed with costs.

CARTWRIGHT, MASTER. JANUARY 8TH, 1907.

CHAMBERS.

McPHERSON v. GRANT.

Pleading—Statement of Claim — Amendment — Slander—Words Spoken to other Persons.

By the statement of claim plaintiff alleged a slander uttered in May, 1905, to one Munro, and also others spoken

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to the same person at times and places not known to plaintiff.

Before the trial could be had Munro died.

Plaintiff moved to be allowed to amend the statement of claim and set up similar slanders uttered by defendant to two other persons about the same period.

Featherston Aylesworth, for plaintiff.

J. A. Macintosh, for defendant.

THE MASTER:—The question is, do the wide powers of Rule 312, applied in the spirit of the Ontario Judicature Act, sec. 57, sub-sec. 12, allow the amendments asked for to be made?

It would seem that they can be properly so applied. This is certainly a matter arising between the same parties, and should therefore, if possible, be disposed of in the present action. To allow this to be done would seem to be in the interest of defendant. For, if plaintiff had to bring a new action, she would not be obliged to give security for costs if unable to pay the costs of the present action. And, even if finally successful, he might be obliged to pay his own costs of both actions.

This will, even at the worst, be materially alleviated by allowing the amendment and directing that the costs be as in Hunter v. Boyd, 6 O. L. R. 639, 2 O. W. R. 1055.

I do not think the amendments asked for here go beyond that which was allowed in that case. The examination of defendant took a wider range than would seem to be indicated by the statement of claim. But at the end defendant says of plaintiff, "She is a moral woman as far as I can say." He denies ever having made any of the slanders imputed to him, though he admits making remarks of some kind to others, and having conversed somewhat freely with certain persons named about the plaintiff.

In these circumstances, it is only fair that plaintiff should be allowed every reasonable facility in vindicating her good name. See Butt v. Butt, 2 O. W. R. 423.

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FALCONBRIDGE, C.J. JANUARY 10TH, 1907.

CHAMBERS.

IMPERIAL TRUSTS CO. v. NEW YORK SECURITIES CO.

Mortgage — Redemption — Extending Time for—Terms—Costs.

Appeal by plaintiffs from order of Master in Chambers extending the time for redemption.

W. H. Lockhart Gordon, for plaintiffs.

W. H. Irving, for defendants.

FALCONBRIDGE, C.J.:—When this appeal came on to be heard, so much of the extended time had expired, that the discussion became entirely academic. In view of the uncertain and problematic character and value of the property, of the want of reasonable prospect of sale apparent in the mere giving of an option, and of the general vagueness of the situation, I should, if an application for a further extension were made to me, unless something more practical and tangible should be put forward, impose some terms like those imposed in Holford v. Yate, 1 K. & J. 677, and in 3 or 4 cases in 2 Ch. Ch. The present order need not be interfered with.

The costs of this appeal, fixed at $10, will be added to the amount given by the Master's order.

BOYD, C. JANUARY 10TH, 1907.

CHAMBERS.

SHEARD v. MENGE.

Costs—Dismissal of Action—Disposition of Costs Reserved at Abortive Trial—Conduct of Parties.

Motion by defendant for an order disposing of a part of the costs of the action which had been reserved by BOYD, C., for disposition at the trial.

J. P. Eastwood, for defendant.

E. J. W. Owens, for plaintiff.

BOYD, C.:—When this case was heard before me on 17th September, 1901, I gave a written judgment expressing the

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opinion that the legal right appeared doubtful, and that it was expedient that the merits should not be determined without the presence of other parties who were interested in the maintenance of the drain in common with defendant. There was also some evidence pointing to a right of drainage which might be prior to plaintiff's acquisition of title. All things considered, I gave plaintiff leave to amend by adding parties, and directed that when the record was thus completed and all issues respecting the user of the drain by all parties interested ready to be disposed of, the costs already incurred should be dealt with by the trial Judge.

Plaintiff has not acted upon that judgment, has not amended by adding parties, and has not appealed from it, so that the action has since been tied up. Various reasons are assigned for this, arising out of transmission of interest by death and otherwise.

Defendant has since moved to dismiss the action for want of prosecution, and the Master in Chambers has made an order, dated 22nd December, 1906, dismissing the action with costs, reserving only the costs left for the trial Judge.

The conduct of plaintiff in starting the litigation and not completing it exposes him to pay all the costs properly taxable against him which I reserved for further disposition.

I think that an order should go for payment by plaintiff to defendant of the costs first reserved for the trial Judge, as plaintiff's conduct has rendered it impossible for that direction to be carried out, and the costs of this application to be also paid to defendant.

JANUARY 10TH, 1907.

DIVISIONAL COURT.

O'SULLIVAN v. CLARKSON.

Company — Organization of—Acquisition of Business Concerns—Moneys Paid for Liabilities — False Representations—Action by Shareholder—Repayment to Company of Moneys Paid out—Costs.

Appeal by defendants Clarkson and the Pure Colour Co. from judgment of CLUTE, J., at the trial, in favour of plaintiff.

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The action was brought by Thomas J. O'Sullivan, on behalf of himself and all other shareholders in defendant company except defendants Clarkson and Campbell, for specific performance of an agreement or for damages for breach thereof, for an account of the liabilities of the Campbell Manufacturing Co., paid by defendant company, and repayment by defendants Clarkson and Campbell to defendant company of the moneys expended in payment of the liabilities in excess of $400, and for a declaration that the issue of shares to defendants Clarkson and Campbell was illegal, and for cancellation of the same.

The judgment of the trial Judge declared that defendant company were entitled to be indemnified by defendants Clarkson and Campbell against the payment of all liabilities of the Campbell Manufacturing Co. in excess of $400; found that the proper amount with interest was $2,897.62; ordered that defendants Clarkson and Campbell should pay that sum into Court or give security therefor; restrained defendants Clarkson and Campbell from selling, incumbering, or dealing with their shares in defendant company until all liability should be satisfied, etc.

W. M. McClemont, Hamilton, for appellants.

A. O'Heir, Hamilton, for plaintiff.

The judgment of the Court (BOYD, C., MACLAREN, J.A., MABEE, J.), was delivered by

BOYD, C.:—The action is based upon representations made by Clarkson acting in behalf of the Campbell Manufacturing Company to the plaintiff, representing another company, touching the lands and liabilities of the Campbell Company, and with a view to amalgamation of the two concerns into one corporation—which was carried out in the organization of the defendant company, i.e., the Pure Colour Company Limited. The various objections of form raised with respect to the litigation of the internal concerns of companies are not of much pertinence to this peculiar controversy, which arises from the breaches of the contract entered into with O'Sullivan personally, though the carrying of it out and the enforcement of the representations may be for the benefit of the defendant company. It is evident that the company is controlled adversely to the contentions

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of the plaintiff, and there appears to be no substantial reason why all the relief claimed may not properly be given in this action. Upon the merits I see no ground for criticizing adversely the conclusions of the trial Judge. The plaintiff has done nothing since he came to a knowledge of the untruth of the representations to preclude him from seeking relief as he has done. The contest is not really concerning the internal concerns of defendant company, but as to matters which are fundamental to the proper constitution of that company, arising out of the preceding personal agreements with a view to the construction out of the amalgamated businesses represented by the contracting parties.

The trial Judge has given, perhaps, a larger measure of costs against the defendant Clarkson than in my view should have been given — but the awarding of costs is so largely a matter of discretion that we should not interfere merely on that ground. However, it will serve somewhat to equalize matters if we dismiss this appeal without costs, and that will be the judgment of the Court.

JANUARY 10TH, 1907.

DIVISIONAL COURT.

BATTLE v. WILLOX.

Contract — Construction — Advances — Share of Profits—Breach — Damages—Measure of—Possible Profits—Evidence—Rejection of—Impossibility of Performance.

Appeal by plaintiff from order of ANGLIN, J. (8 O. W R. 4), allowing appeal by defendant from report of Master at Welland in an action for damages for breach of contract, and directing a reference back to assess the damages upon a different basis. By the agreement in question defendant agreed to pay to plaintiff one-fourth of all or any profits arising out of certain contracts which defendant was about to enter into for the supply to certain persons and companies of sand from a gravel pit owned by defendant. The consideration was plaintiff's agreement to become indorser for defendant upon promissory notes for a sum not exceeding $5,000. Defendant, in

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breach of his agreement, sold his gravel pit. Anglin, J., held that, upon the true interpretation of the agreement, defendant did not bind himself absolutely and in any event to obtain and carry out all the contracts mentioned in the agreement, but his agreement was to procure and carry out such of the named contracts as could be obtained, and to account to plaintiff for the profits to arise therefrom.

The appeal was heard by FALCONBRIDGE, C.J., BRITTON, J., MABEE, J.

W. M. German, K.C., and T. F. Battle, Niagara Falls, for plaintiff.

F. W. Griffiths, Niagara Falls, for defendant.

MABEE, J.:—The questions involved upon this appeal depend entirely upon the proper construction of the contract of September, 1904, entered into between plaintiff and defendant. As I read the formal judgment drawn up after the trial, it merely declares that defendant is in breach of his agreement and refers the matter to the Master at Welland to assess damages. The Judge at the trial was asked to intimate upon what principle the Master should proceed, and declined to do so. The Master then was compelled, in order that damages might be properly assessed, to interpret the contract. The matter is by no means free from difficulty.

The first recital is that Willox is the owner of a gravel pit; the second that he "is about to enter into certain contracts hereinafter referred to for the supply to certain persons and companies of sand from said gravel pit;" the third that he "has requested the said Battle to assist him financially in the development of the said gravel pit, and the carrying out of the said contract, and the said Battle has consented upon certain conditions." Then the operative part of the agreement proceeds as follows: "Now this agreement witnesseth that, in consideration of the hereinafter mentioned mutual covenants, promises, and conditions, the said parties hereto do hereby mutually covenant, promise, and agree to and with each other in manner and form following, that is to say: 1. The said Willox is to enter into contracts as follows." Here are given the names of the persons and companies and the estimated number of yards to be taken by each, aggregating from 75,000 to 85,000 yards, and "all at a price not less than 85 cents a yard, delivered upon their re-

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spective works, unless otherwise agreed to between the parties hereto." "2. The said Battle is to become indorser on promissory notes made by said Willox, not exceeding in amount the sum of $5,000."

The single question is, whether, under the foregoing document, defendant covenanted with plaintiff that he (defendant) would obtain or enter into the said contracts, or whether upon the reference it was open to defendant to shew by way of reducing the damages that he was unable to obtain the contracts. The Master regarded it as not open to defendant to give evidence that he had not got or could not get these contracts, and assessed the damages to plaintiff at one-fourth of what the profit would have been upon all the contracts enumerated in the agreement, and upon appeal my brother Anglin took the view that upon the true interpretation of the contract defendant had not bound himself absolutely and in any event to obtain and carry out all the contracts enumerated.

It is not contended that a person may not by a contract make himself liable for its breach where the performance of such contract depends upon the concurrence of some third person over whom he has no control. Has defendant placed himself in that position? With the greatest respect for the view taken by my brother Anglin in his carefully considered judgment, I am clearly of the opinion that the defendant has. Suppose that the position had been reversed, and Battle had refused to indorse the notes for $5,000, and Willox had brought action against Battle for damages for his refusal, could the latter have said he did not covenant to indorse? The agreement is, "Battle is to become indorser," etc. I think it is plain that Battle could not be heard to say he had not covenanted to indorse. The wording is the same in the obligation defendant has entered into—"The said Willox is to enter into contracts as follows." Surely this is as binding upon defendant as plaintiff's engagement would be upon him. I am unable to read this as only an agreement that defendant would procure and carry out such of those contracts as he could obtain. If that had been the intention of the parties, I think they would have so expressed themselves. If a man covenants that he is to do something, viz., "to enter into contracts," I think he cannot escape liability for damages by shewing that the persons he expected to make these contracts with would not in fact contract with him. I do not agree

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with the Master that the matter had been concluded at the trial, but I think evidence was properly excluded that defendant was unable to obtain the contracts he had agreed to get. Of course, had he been prevented by anything done by plaintiff, he might be at liberty to shew that, but that is not the contention, nor was it suggested that defendant had been prevented from performance by the act of God. . . .

[Reference to Thornbourn v. Whitacre, 2 Ld. Raym. 1164; Hochster v. de la Tour, 2 E. & B. 688; Barker v. Hodgson, 3 M. & S. 267; Paradin v. Jane, Aleyn 26; Hall v. Wright, E. B. & E. 749.]

I think if the Master had admitted the evidence tendered, viz., that defendant had tried to get these contracts and that the persons named would not give them to him, the result must still have been the same.

Behind all this also lies the fact that defendant, in direct breach of his agreement, and after he had obtained plaintiff's indorsement for nearly $5,000, sold and conveyed away the sand pit without plaintiff's knowledge, and thereby deliberately by his own act put it out of his power to fulfil the contracts, even had he obtained them.

I have gone through the evidence and the findings of the Master more than once, and I am of the opinion that the findings were proper and should be restored.

Some minor matters were raised by the notice of appeal, which were not finally disposed of by my brother Anglin, and the appeal as to these, together with the costs of the appeal before him, should go back to him to be disposed of.

Defendant should pay the costs of appeal to this Court.

BRITTON, J., gave reasons in writing for the same conclusions.

FALCONBRIDGE, C.J., concurred.

CARTWRIGHT, MASTER. JANUARY 11TH, 1907.

CHAMBERS.

BRADSHAW v. COHEN.

Costs—Discontinuance of Action—Pleading — Guarantee—Denial.

Motion by plaintiffs for an order allowing them to discontinue the action without costs.

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A. C. McMaster, for plaintiffs.

J. E. Jones, for defendant.

THE MASTER:—Defendant carries on at Sault Ste. Marie a business which is managed by her husband, A. Cohen. She has had dealings for some years with plaintiffs, who knew the state of the matter.

On 23rd September, 1905, plaintiffs' traveller was in Sault Ste. Marie, and was asked by A. Cohen's brother to sell to him. This the traveller refused to do unless on a guarantee by Mrs. H. Cohen, the defendant. Thereupon defendant's husband gave the following:—

"Mr. Bradshaw & Co. Dear Sir:—Whatever my brother buys from you I will see that he will pay for it in due time. H. Cohen."

Afterwards goods were sent to the brother to the amount of $442.30. Nearly three-fourths of these would seem to have been sent some time in November, so that plaintiffs had ample time to inquire from Mrs. Cohen if her husband had power to bind her by the guarantee, or if she would ratify it. The brother has left the country without paying for the goods, and on 23rd February, 1906, this action was begun on the guarantee. Statement of claim was delivered on 11th May and statement of defence on 19th. For some unexplained reason nothing was done until 13th December, when defendant was examined for discovery.

The statement of defence denied the giving of any guarantee by defendant or that the husband had any authority for giving the same. It also stated that the traveller had asked for a guarantee, and that the husband wrote the following document: "Messrs. A. Bradshaw & Son. I do not guarantee no one, but will try that A. J. Cohen will pay—Sept. 23, '05. H. Cohen;" that he did not write the guarantee set out verbatim in the statement of claim.

It was urged that because of the denial of the document actually signed, plaintiffs should be relieved from the costs of the examination. This might have been so if that had been the only defence set up, and might have justified dismissal of action without costs. Here, however, is a distinct

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denial of defendant having given the guarantee sued on, or authorized her husband to do so. It cannot be contended that as manager he had any implied authority. The whole difficulty was caused by the assumption that defendant's husband had such authority. It could easily have been ascertained at the time or before delivery of the goods what position defendant would take. There was nothing done by defendant as in Armstrong v. Armstrong, 9 O. L. R. 14, 4 O. W. R. 223, 301, to mislead the plaintiffs, and I cannot see any good cause for depriving the successful party of costs.

The motion must be dismissed with costs. If necessary, plaintiffs have leave to appeal.

RIDDELL, J. JANUARY 11TH, 1907.

TRIAL.

WATSON v. GRANT.

Mortgage — Assignment—Registration—Absence of Actual Notice or Knowledge—Payment to Original Mortgagee—Rights of Assignee against Mortgagor and Grantee of Equity of Redemption—Foreclosure—Parties.

Action by the assignee of a mortgage for foreclosure, etc.

J. G. Harkness, Cornwall, and J. C. Milligan, Cornwall, for plaintiff.

R. Smith, Cornwall, and A. Langlois, Cornwall, for defendant Grant.

D. Danis, Cornwall, and J. A. Primeau, Cornwall, for defendant Kier.

RIDDELL, J.:—The facts of the case are very simple. Defendant Grant mortgaged certain lands to a firm of solicitors in Cornwall for $650; the mortgage is dated 25th April, 1902, and registered 30th April, 1902. The solicitors had a client, the plaintiff, for whom they were accustomed to invest money, and from time to time to collect and pay over principal and interest. They borrowed from plaintiff on

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their own account $500; and, upon the 30th April, 1902, assigned the mortgage in question—the Grant mortgage—to plaintiff as collateral security. This assignment was registered on the same day as and with the mortgage. No notice of this assignment was given or came to Grant until some time in July, 1906.

On 8th May, 1906, Grant conveyed the property in question to the defendant Kier by a deed containing the usual covenants against incumbrances, for quiet enjoyment, etc. Kier was not, before the bargain was made, though he was after, informed of the existence of the mortgage. The firm of solicitors paid to plaintiff the interest from time to time and also certain payments on account of the principal of $500, leaving, as the plaintiff contends, still due $200 and interest from 28th October, 1905. The solicitors contend that they have an open and unsettled account with plaintiff, which will almost, if not entirely, wipe out their indebtedness. This plaintiff denies. I do not pass upon this dispute.

When Kier bought the land from Grant, the purchase price being $600, he went with Grant to the office of the solicitors, paid Grant $450 in the presence of one of the solicitors; Grant picked up the money and handed it to the solicitor, and said, "I suppose this is yours." The solicitor retained $250, and, as he says, applied this sum upon and to settle the mortgage, and handed back the remainder, with certain deductions, to Grant. There can be no doubt that as between Grant and the original mortgagees, the mortgage was then fully paid off. And this is not disputed. It is clear, also, that Kier knew at the time he was paying his purchase money that the land was subject to a mortgage.

Early in July, 1906, plaintiff saw one of the solicitors, and was informed by him that the Grant mortgage had been paid off. At the trial he first said that after this information came to him, but not before, he demanded payment of the balance from the solicitor. Afterwards, however, he denied this, and, as the solicitor also says that no demand was made upon him for the balance, I accept this latter statement. Instead of demanding the balance of his claim from his immediate debtors, the solicitors, he caused this action for foreclosure to be brought against Grant and Kier.

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The defendants allege that the mortgage was paid; and the defendant Kier further alleges that if it be held for any reason that the action should succeed as against him, he should be indemnified by his co-defendant Grant, and Grant should be ordered to pay off the incumbrance.

An order was made that the issues between Grant and Kier should be tried at the same time as the other issues in the action, and the whole case came before me at Cornwall in this condition.

It was admitted by plaintiff that Grant had paid the whole amount of the mortgage to the original mortgagees, without any notice or knowledge of the assignment, and that this entitled him to have the action dismissed as against him. No other position could, I think, have been successfully taken in view of such cases as Galbraith v. Morrison, 8 Gr. 289; Engerson v. Smith, 9 Gr. 16; Williams v. Sorelly, 4 Ves. 389; Norrish v. Marshall, 5 Mad. 475.

The action, therefore, will be dismissed as against Grant, with full costs of suit, and with a declaration that the mortgage has been fully paid and satisfied and Grant entitled to a certificate of discharge of the same.

As against Kier, however, it was contended by Mr. Harkness, in a very able argument, that the case was different, and he relied upon Gilleland v. Wadsworth, 1 A. R. 82, as conclusively establishing the right of foreclosure. I must of course, loyally follow that case, and, if the effect of the decision is as plaintiff contends, he must be given all the relief he asks against Kier. The result would be that while a judgment would go in the usual form against Kier, he would be entitled to a judgment that Grant should pay off this incumbrance, and that to the plaintiff (see Canavan v. Meek, 2 O. R. 636); so that, while Grant would by this judgment be relieved from paying plaintiff the balance on the mortgage, and plaintiff would be declared not entitled to receive such balance from Grant, the judgment would go on to declare that Grant should and must pay this balance to plaintiff. It is somewhat difficult for me to understand why, when Grant would go to plaintiff to carry out the terms of this judgment he would not be in a position to say that the Court had declared that he had already paid the amount. If not, then a mortgagor who sells his equity of redemption is placed at a

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disadvantage as compared with one who does not, and no one is safe in selling an equity of redemption without searching the registry office. The fact that the logical result of a decision is an apparent absurdity may not necessarily shew that such decision is not sound; and I may be bound to decide in favour of plaintiff notwithstanding that the result may strike me as an anomaly. Law is not an exact science, and Lord Halsbury but crystallized what had been long in solution when in Quinn v. Leathem he denied that a decision could be quoted for a proposition that may seem to follow logically from it; and we should scan with great care the authority which it is contended leads to results such as have just been suggested.

In Gilleland v. Wadsworth the facts were as follows. One Brown was the owner of lot A.; he mortgaged this lot to C.; C. assigned this mortgage to J.; and at the same time C. covenanted with J. to pay the mortgage. One Wadsworth owner lot B.; he and Brown made an arrangement for the exchange of lots A. and B.; Brown, informing Wadsworth of the existence of the mortgage, agreed to have the mortgage transferred from the lot he was conveying to Wadsworth, viz., lot A., to the lot he was receiving, viz., lot B. No notice had been given to Brown of the assignment, and both he and Wadsworth thought that C. was the owner of the mortgage. C. being a solicitor, Brown and Wadsworth went to C. to have the conveyances drawn. C., instead of informing them that he was no longer the owner of the mortgage, gave to Brown a discharge of the mortgage, and took a new mortgage from Brown upon lot B., which he was acquiring. C. paid interest regularly to J. and his executors for a considerable time, and then ceased. Thereupon the plaintiffs, the executors of J., applied to Brown, who then for the first time became aware of the assignment. A bill in Chancery was filed by the personal representatives of J. against the personal representatives of Wadsworth. Brown was not made a party to the suit. See Appeal Cases, vol. 3, Library Court of Appeal. It was held by the Court of Appeal, 1 A. R. 82, reversing the decision of the Chancellor (Spragge) that Wadsworth, acquiring the equity of redemption after the registration of the assignment from C. to J., must be held to be affected with notice of the assignment.

Irrespective of this decision the Registry Act, R. S. O. ch. 136, sec. 92, would compel me to hold, as I do, that the

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registration of the assignment to the plaintiff "constitutes notice of the instrument" to the defendant Kier, and that he must be in the same condition as through he actually had express notice of the assignment.

Returning to the Gilleland case, the defendants argued (p. 85): "If Brown has a valid defence, Wadsworth should stand in his position. The plaintiff could not recover in an action against Brown on the covenant in his mortgage because Brown could not plead payment, and the registry laws would not affect him with notice. . . . If the payment by Brown is not a discharge of the mortgage, then Wadsworth should have recourse over against Brown, but he could not recover, as Brown could plead payment as between himself and plaintiff." I do not assent to the argument that Brown would have had a valid defence against Wadsworth, under the circumstances, and the point does not seem to be covered in the judgments. However that may be, the fact is that the defendant did not take the precaution of making Brown a party to the suit, and while the Chief Justice lays down (p. 91) that "Brown might insist, if it were in any way material to his interests, that the first mortgage was extinguished," Brown, not being in any way before the Court and not being a party to the suit, could not in that suit make any contention—the rights of Wadsworth only were being dealt with. It was in a suit so constituted that it was held that Wadsworth had not the right to have it considered that the mortgage was extinguished.

In the present case plaintiff has brought both the parties before the Court. Grant is an original party defendant, and is, I think, entitled to urge, as he does, that if any judgment go against Kier, he, Grant, will be compelled to pay his mortgage money over again—that this is most material to his interest — that he ought not to be forced to pay by indirection what he cannot be forced to pay directly. I do not think that there is anything in the Gilleland case which prevents him from making this contention—and in succeeding in it. While most respectfully and loyally following the decision of the Court of Appeal, I decline to carry the law one hair's breadth further as against these defendants. The case referred to being, as I think, distinguishable, I do not think it concludes the present case. It may well be that a Court should say to those situated as the defendants were in the

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Gilleland case: "You are defending here upon the strength of your own position. You do not bring before the Court the person who should have got rid of this incumbrance. You appear to be content with the covenant you have from him. All the equities and rights cannot be worked out in a suit framed as this is, and your covenantor cannot help you. Therefore you must stand or fall by your own strict rights." But in an action constituted as the present is, with all parties before the Court, the rule may well be different. At all events, I shall leave it to an appellate court to carry the principle of the Gilleland case into such a case as the present.

It was contended by the defendants that the solicitors should be held to be the agents for plaintiff with authority to collect the principal and interest. I do not think that this contention can prevail, even were the solicitors agents in any sense: Kent v. Thomas, 1 H. & N. 473; Gillen v. Roman Catholic Episcopal Corporation, 7 O. R. 146; In re Stacey, 21 A. R. 454.

But it is not to be forgotten that Grant when paying did not pay to the solicitors in the capacity of agents for plaintiff, but as being themselves the principals. I do not think defendants can succeed on that ground.

The pleadings may be amended if necessary.

In the result the action will be dismissed with costs on the High Court scale as against both defendants. Thirty days' stay.

MAGEE, J. JANUARY 11TH, 1907.

TRIAL.

CARTER v. HUNTER.

Assessment and Taxes—Tax Sale—Setting aside—Lands not Included in List of Lands for Sale—Vague and Indefinite Description of Lands in Assessment Roll—Assessment Act—Lien of Purchaser—Purchase Money—Taxes — Mesne Profits—Improvements—Reference.

Action to set aside a tax sale made 10th April, 1901, to defendant for arrears of taxes on lots 2 and 3 in block B. on

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the east side of Gladstone avenue on plan 396, in the city of Toronto, and the conveyance to her made pursuant thereto, in so far as it affected these two lots. The action was commenced on 9th April, 1903.

J. A. Worrell, K.C., and W. D. Gwynne, for plaintiff.

J. W. St. John and W. C. Chisholm, for defendant.

MAGEE, J.:—Plaintiff in 1890 became assignee of a mortgage on the land made by one Milne, who in 1890 conveyed to Jesse D. Hannah and James B. Hannah. In June, 1894, plaintiff obtained a final order of foreclosure against Milne and the Hannahs.

Plaintiff has since 1890 resided in England, and had no domicile or place of business in Toronto, and he did not at any time require the land to be assessed to him. Through his representative in Toronto, he knew in 1894 of the alleged arrears of taxes, and when in 1898 the land was offered for sale for the taxes of 1893-4-5, at which sale there were no bidders, he knew of it and had a representative present watching the proceedings. The foreclosure order was not registered till 1903, and the city officials would not from the registry books have any information of his ownership. There is nothing to shew that any of them knew who was the owner after 1894. It is not alleged that any of the taxes 1893-1898 were paid. . . . The sale to defendant was made for the arrears of taxes for the years 1893 to 1898 inclusive. . . .

The deed to defendant is dated 23rd April, 1902, and correctly describes lots 2 and 3 in question, making no reference to the descriptions in the warrant. It includes, as permitted by sec. 201 of the Assessment Act, two other parcels which defendant had bought at the same sale, but it mentions only one sum as the consideration paid for all; as to which see sec. 203. The deed was registered on 7th May, 1902. Defendant subsequently received rents and profits and paid taxes and made outlay for repairs, etc., and paid a small sum to the man who occupied the stable to get possession.

It is contended for plaintiff that his land should, under secs. 3, 22, 34, and 132, have been treated as "lands of non-

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residents" and separately entered on the assessment roll as such and entered on the non-resident roll of taxes instead of on the collector's roll. It is not shewn or alleged that any prejudice resulted to him from this not being done. The course adopted was more likely to be beneficial to him. . . .

The most serious objection to the tax sale is the direct breach of sec. 176 by selling in April, 1901, without having either in the preceding January or in January, 1900, which preceded the date of the mayor's warrant, included the lands in the list of lands liable to sale furnished to the clerk under sec. 152. They were omitted from the lists furnished in January, 1901, and September, 1900, and had not been included in any list more recent than January, 1899, nor in any list but that one and that of September, 1896. The provision of sec. 176 is express. . . .

[Reference to Fenton v. McWain, 41 U. C. R. 239.]

I need not refer to the numerous cases which have held the provisions relative to delivery of this list to be imperative. This sec. 176 is not less so than the others, and a sale in disobedience to it cannot be upheld.

The description of the land in the assessment rolls from 1893 to 1898 is too vague and indefinite to be a compliance with the Act. Section 13 requires the assessor to enter the "description and extent or amount of property," and as to land of non-residents, sec. 34 is even more specific, and the form of the assessment roll, sec. 13, calls for the number of the lot, house, etc.; and see also sec. 29 as to vacant ground. Neither street number nor lot number are given. It is only upon the assumption that the assessor was entering every parcel of land on the east side of Gladstone avenue throughout its entire length in exact regular order from south to north, that one can presume to locate the parcels which are said to represent these lots 2 and 3. There is nothing in the Act requiring the assessor so to proceed, and no reason beyond probability for making such an assumption. We can assume that the parcels were on the east side of Gladstone avenue, but beyond that nothing. For all that the roll shews they may be parcels half a mile distant on the same avenue. Even the size of the lots is not a guide, for it is not exact, and there are 44 other lots

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within two blocks, A. and B. alone, of practically the same dimensions. As between the two lots themselves there is only the mention of the building to indicate on which the larger amount of taxes was due. It is only in the treasurer's lists of September, 1896, and January, 1899, that an attempt is made to be more specific by describing one parcel as south of No. 97 and the other (in the 1899 list) as north of 91. These descriptions are adhered to in the advertisement and in the certificate of sale. There is nothing in the assessment rolls to distinguish between house or street numbers and lot numbers.

The assessment roll is the basis of all subsequent proceedings, and if it is too uncertain for the Court to ascertain where the land is, the treasurer cannot by making a guess, however good, make valid the subsequent proceedings, which owe their existence to the roll itself. We cannot expect nicety and precision in such matters and in such a document, but there should be at least substantial certainty.

In Wildman v. Tait, 32 O. R. 274, affirmed on this question in 2 O. L. R. 307, an assessment in 1890 and 1891 of a parcel described as "occupant—water lot," "owner—John Maughan," "size of lot 436 x 660." was held clearly invalid. I am unable satisfactorily to distinguish the present case from that on this question, though there were other objections there. Here all the assessments, 1893 to 1898 inclusive, are equally defective.

Upon these two grounds, of disregard of sec. 176 and insufficiency of description in assessment, I find the sale to have been invalid, and the deed to defendant, so far as relates to these two lots, to be also invalid. Other grounds were urged, but it is not necessary to deal with them.

The assessment being invalid, it follows from the decision of the Divisional Court in Wildman v. Tait, 2 O. L. R. 307, that defendant cannot claim a lien on the land under sec. 218 for the amount of purchase money paid by her. She asserts that she has paid taxes for the years since 1898. No evidence was offered as to the mode of assessment after that year. As to any years in which the pro-

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perty was insufficiently assessed, she will have a lien upon each lot for the taxes paid thereon and interest as under sec. 218, less the rents and profits derived therefrom, out of which, however, she should be allowed to deduct her outlay for repairs and improvements, including fencing and the partition in the stable, and also the amount paid to Thompson for possession of the building on lot 2. If the parties differ as to the amount of the lien, there will be a reference to the Master. If they so desire, the reference may include an inquiry as to mesne profits, with authority to the Master to direct payment—the pleadings in such case being amended in that respect. Otherwise mesne profits are not dealt with, except in so far as they may reduce the lien, and the judgment is not to prejudice any claim of plaintiff therefor. If the parties so desire, they may submit to me the assessments for the years since 1898, and I will decide as to the lien therefor, and they can then probably come to a conclusion whether such lien would be exceeded by the rents and profits.

Plaintiff will have the costs up to judgment. The costs of the reference, if any, will be disposed of by the Master.

RIDDELL, J. JANUARY 12TH, 1907.

TRIAL.

SMITH v. MATTHEWS.

Sale of Goods—Action for Price—Findings of Fact—Election to Sue Agents—Third Parties—Indemnity—Costs.

Action to recover the price of certain wheat and other grains alleged to have been sold to defendants.

J. N. Fish, Orangeville, for plaintiff.

W. H. Blake, K.C., for defendants.

A. A. Hughson, Orangeville, for third parties.

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RIDDELL, J.:— . . . Plaintiff is not to be relied upon in any evidence affecting himself. The witness Dods is not much better, but where Dods and plaintiff disagree, I believe Dods. In some cases where they agree it is difficult to believe either plaintiff or Dods. It is somewhat difficult to arrive at the facts of the case, but . . . I arrive at the following conclusions:—

Plaintiff is entitled as against defendants

	To $392\frac{10}{60}$	bush. of	wheat at	62c. =	$243	14
	$168\frac{2}{3}$	"	"	63c. =	106	26
	$190\frac{1}{2}$	"	peas	60c. =	114	30
(Aug. 10, 1900)	$109\frac{18}{60}$	"	barley	41c. =	44	81
	$911\frac{26}{60}$	"	"	36c. =	328	12
					$836	63
	And he must credit				700	00
	Leaving a balance due of				$136	63

No interest should be allowed.

I cannot find any such act of election as should bar plaintiff's right to proceed against these defendants.

There will be judgment for plaintiff against defendants for $136.63.

Exercising the discretion given me by the law, I direct that plaintiff shall be awarded costs on the County Court scale to and including 3rd November, 1906. Against these sums will be set off the excess of defendant's costs between solicitor and client, to and including judgment, over their County Court costs between party and party to and including 3rd November, 1906.

Defendants are entitled to full indemnity from the third parties, as well for any damages and costs they may have to pay as for their own costs between solicitor and client. While I am compelled to hold that these third parties, as the authorized agents of defendants, received the grain for which plaintiff recovers judgment, I do not find that this was ever delivered to defendants by them,

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but, on the contrary, I find that it was not so delivered. Their method of doing business may and does make it difficult to arrive at the exact facts, but I have no doubt of the accuracy of this finding.

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THE

ONTARIO WEEKLY REPORTER

(TO AND INCLUDING JANUARY 19TH, 1907).

VOL. IX. TORONTO, JANUARY 24, 1907. NO. 2

RIDDELL, J. JANUARY 14TH, 1907.

TRIAL.

STEEN v. STEEN.

Execution — Sale of Land by Sheriff under — Purchase by Person Who has Acquired Rights of Execution Creditor—Irregularities—Lis Pendens — Advertisement—Description of Land—False Bidding—Sale at Undervalue—No Interference in Conduct of Sale—Ratification of Sale by Execution Debtor—Participation in Proceeds.

Action to set aside a sale to defendant of certain land by the sheriff of Cornwall, Dundas, and Glengarry, under an execution against the lands of plaintiff.

D. B. Maclennan, K.C., and C. H. Cline, Cornwall, for plaintiff.

R. A. Pringle, Cornwall, and A. Langlois, Cornwall, for defendant.

RIDDELL, J.:—John Cyril Steen was the owner of those parts of the west half of lot 27 and the east half of lot 28 in the 1st concession of the township of Osnabruck, in the county of Stormont, lying south of the line of the Grand Trunk Railway, the lots being numbered from east to west. These two parcels adjoined each other and formed the homestead. He had received this land by a deed from his father. Steen went to British Columbia, where he carried on business until the time of his death in May, 1893. The plaintiff, Olive Steen,

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who was one of his 4 sisters, went out to him in 1890, and continued to reside with him till the time of his death. After his death . . . she carried on his business, letters of administration having been granted to her by the Supreme Court of British Columbia. She was not successful, and in her endeavours to make the business a success she, by 1903, became largely indebted to the Bank of Montreal (Rossland branch). Her brother had left a stock of liquors and also certain real estate at various points in the west; and apparently plaintiff thought that if she could get time she would be able to realize enough out of the properties to pay the bank and the other creditors of the testator.

In his will John Cyril Steen had devised the land in question (hereinbefore mentioned) to his sister the plaintiff. In 1895 another sister, Emily Steen, suing on behalf of herself and of all other the next of kin of John Cyril Steen, brought an action against Olive Steen, the plaintiff herein, to set aside the will of John Cyril Steen, but this action was discontinued in August of that year.

In 1903 the bank were pressing plaintiff to settle her indebtedness, and she thereupon went to a solicitor in Rossland, B.C., and, as she says, "to keep Fraser, the bank manager, guessing," and to give her time, she had a conveyance drawn up and executed whereby she purported to convey to her 3 sisters, Emily Steen, Mary Ann Steen, and Alice Gertrude Steen, the east half of lot 27 and the west half of lot 28. At the trial before me she said she knew that she had no interest in these portions of land (as indeed she had not), and that she did not intend to convey the homestead. With the entire concurrence of her counsel, I find the fact to be that the description of the lots was a mere mistake, and that she did intend to convey the homestead. She had sworn more than once that she did convey the homestead; but, as she says, she is sometimes "not responsible." She at the same time made conveyances of other portions of her land —which need not further be mentioned.

The bank brought an action in the High Court of Justice for Ontario on the 27th May, 1903, against the 4 sisters and the grantee of another piece of land in Ontario, alleging that the bank had recovered judgment in the Supreme Court of British Columbia on 14th May, 1903, against plaintiff for $8,571.39 damages and $31.72 costs, and claiming that amount and to have the conveyances set aside. At

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this time it was supposed and believed by all parties that the conveyance by plaintiff to her 3 sisters covered the homestead. In the meantime, however, and about March, 1903, plaintiff had delivered over to the bank certain property in British Columbia as security for her indebtedness. This she pleaded in the Ontario action, and that the property was far in excess of her indebtedness. She also pleaded that as to the lands conveyed to her sisters, these were always intended by Robert Steen, their father, for the use of the family, although vested in her. The 3 sisters pleaded that Emily Steen always had and still asserted that the will of John Cyril Steen was null and void, because he was not when he made it competent, that she had brought the action I have mentioned, and that it was not proceeded with but discontinued, upon terms that plaintiff should convey the homestead to them, and that it was in pursuance of this arrangement that the deed was made. They also claimed the land by virtue of the Statute of Limitations; and pleaded further that the will of John Cyril Steen was null and void, and that in any case plaintiff had only a one-fourth interest in the homestead; and finally that even by the will she had only a life estate.

In an examination in that action the plaintiff swore that the conveyance was made because her sisters were attacking the will. The case was set down for trial at Cornwall for May, 1904, and was from time to time adjourned. Negotiations were entered into with the solicitor for the bank, Mr. Leitch, by Mr. Smith, acting upon the instructions of Alice for herself and Emily and Mary Ann, her sisters. These negotiations were carried on with the full knowledge and approval of plaintiff and her solicitors; and it was arranged on or before 2nd December, 1904, by Mr. Smith and Mr. Leitch that Alice Gertrude Steen (the defendant in this action) should pay a certain sum, and that then the bank would abandon all claim to the homestead. About this time and between 2nd and 11th December, 1904, the mistake in the deed was discovered for the first time, whereupon plaintiff at once declared that she never had intended to convey the homestead at all—and the sisters parted forces. This pretence by plaintiff was baseless, as I think is admitted. Then the solicitors for the bank and for the defendant arranged a new contract, which was completed by 19th December. This recites that the bank held

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certain property of Olive Steen in British Columbia as security for her indebtedness, which was expected to realize only a small sum; and further recited that defendant had agreed to pay $3,500 in cash for the balance of the judgment held by the bank in British Columbia, which should remain after crediting thereon the proceeds of all the said property which the bank held in British Columbia as security. And then follows the operative part: "Now, therefore, the plaintiffs (the bank) as a settlement of the said action (in Ontario) agree to accept the said sum of $3,500 from the said Alice Gertrude Steen, and to transfer and assign to her the said judgment which they now hold against the said Olive Steen when and as soon as they shall have disposed of the said property which they hold as aforesaid in British Columbia, said assignment to include only the balance due to the plaintiffs after crediting the proceeds of the said property. And the plaintiffs further agree to allow the said Alice Gertrude Steen to prosecute this action to judgment against the said Olive Steen in plaintiffs' name and to assign the said judgment so to be recovered herein to her the said Alice Gertrude Steen for the balance that may remain owing thereunder as aforesaid."

The $3,500 was forthwith paid by Alice Gertrude Steen, who became alarmed at the position taken by plaintiff Olive, who was now openly contending that the land was all her own. Consequently Alice Gertrude Steen caused an action to be brought in the High Court of Justice, in the name of herself and her two sisters, against Olive, and caused a certificate of lis pendens to be registered against the land—no doubt to prevent Olive from dealing with the land before a writ of fieri facias could be obtained in the bank's action then pending. This action was proceeded with so far as it was necessary to obtain judgment in the Court in Ontario upon the British Columbia judgment, and also as to the other pieces of land not material to be considered here. The case was tried at Cornwall, before the late Mr. Justice Street, on the 11th January, 1905, and resulted in a judgment in favour of the bank for $7,609 and costs . . . taxed at $336.12. Execution for the $7,609 was placed in the sheriff's hands on 26th January, 1905, and for the costs on 18th May, 1906.

Mr. Leitch continued to have the conduct of the action for the bank (nominally), and he directed the sheriff to

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sell the lands. The sheriff advertised in the Ontario Gazette for more than 3 months and in the Cornwall Standard for 4 successive weeks before the sale, and for 3 months kept posted on the door of the court house and in the office of the Clerk of the Peace a proper notice of the sale to be had upon the 26th April, 1906. The plaintiff here complains that the advertisement was not prominent enough; but I can find nothing to complain of in that respect. Both the sheriff and Mr. Leitch made more than usually careful inquiry as to the price the property should bring, and the sheriff made up his mind in good faith, and I think on sufficient grounds, that if the property realized $5,000 it would be a good sale. Mr. Leitch from his inquiries came to the conclusion that $5,000 would be the outside figure. A great deal of evidence was given at the trial as to the value of the land; and I have come to the conclusion from having seen the witnesses that $5,500 was not only not an undervalue, but that it was as large a sum as the property could be expected to realize at an auction sale, had the advertising been of the most extensive character. The sale for $5,500 to Alice Gertrude Steen, the defendant, was not, I find, at an undervalue.

Plaintiff was anxious at all hazards to delay the sale, and her solicitor used every means that he could think of to obtain a delay. Plaintiff seems to have thought that if she could get delay, she might be able to secure money, and buy the property herself—and so her solicitor informed the sheriff. This expectation was, I think, not well founded. The sheriff declined to delay the sale, for reasons that I think were sufficient. Thereupon the solicitor came to the sheriff's office at the opening of the sale, and handed the sheriff a letter, pointing out that there was a lis pendens upon the property and forbidding the sale until the lis pendens should be removed. He asked that this letter should be read at the sale. The sheriff, consulting Mr. Leitch and Mr. Smith, was advised by them not to read the letter, as that might dampen the sale. The solicitor then himself stated to those present the objection he was taking. Mr. Smith explained fully that he was the solicitor who had registered the lis pendens, that the writ of summons never had been served and had lapsed, and that the lis pendens was therefore now a nullity. Plaintiff's solicitor went away, and then came back and openly con-

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tended that plaintiff's interest should have been stated, that she had no interest in some of the land mentioned, that her interest was doubtful, and ought to have been stated accurately. Mr. Leitch openly explained that whatever interest she had would be sold. No other objection was taken by plaintiff's solicitor, and all these objections were taken simply that there might be no sale, and not because plaintiff or her solicitor thought that any alleged irregularities would affect the sale. Bids were made by Mr. Leitch, Dr. Stacey (a man of means in Cornwall), Mr. Smith, and defendant — the defendant's last bid, i.e., for $5,500, being accepted. No evidence was given shewing or tending to shew, nor is it contended as a fact, that any defect or irregularity in the advertisements did prevent a single intending buyer from attending or bidding, or that it did lower the price obtained by one dollar. And I find as a fact that nothing of the kind did take place. The farm having been sold to defendant, she paid her money, $5,500, to the sheriff by cheque.

Plaintiff thereupon, with a full knowledge of all that had taken place, arranged with her solicitors that they should bring an action against her and share in the proceeds of the sale, thereby allowing her to have the benefit of the sale to that extent at least. This was done, and the $5,500 was divided between the defendant and the plaintiff's solicitors, the bank directing that the defendant should receive the dividend to be allotted to the bank's judgment. Plaintiff received credit upon her bill of costs for the amount allotted to her solicitors.

This action was brought on the 19th June, 1906; it was alleged therein by plaintiff that there were irregularities in the sale; that the sale was fictitious and at an undervalue; and plaintiff asked that the sale and the sheriff's deed should be set aside; and that it should be declared that defendant holds the land simply as security for the $3,500, and that plaintiff might be allowed to redeem.

The defence sets out that the will of John Cyril Steen was and is invalid; that plaintiff intended to convey the homestead to defendant and her sisters; that this had always been intended by Robert Steen for the benefit of the 3 sisters (not including plaintiff); that they contested the will of their brother, and the conveyance was in settlement of the dispute; and then set out the proceedings

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resulting in the agreement between defendant and the bank; denied all impropriety; and asked by way of counterclaim to have the conveyance reformed. By an arrangement made at the trial this counterclaim was not proceeded with; and any judgment in this action will be without prejudice to an action for the rectification of the conveyance that any one may see fit to bring.

It is contended for plaintiff that the same right of action exists against defendant here that would exist if the execution creditors had bought, and the action were against them. Then it is said that the sale was irregular because (1) of the lis pendens not having been removed; (2) the advertisement is defective because the land is not advertised for sale, but only "all the right, title, and interest of Olive Steen" in the land; (3) and also because what is advertised is all the right, title, and interest of Olive Steen . . . in the . . . west half of lot 27 and the east half of 28 in the 1st concession, etc., whereas she had an interest only in that part of such land south of the Grand Trunk Railway; (4) and because it did not comply with Con. Rule 882 and contain "some reasonably definite description of the land," or with Con. Rule 881 (a) and specify "the particular property to be sold;" (5) and it was in the wrong place in the paper; (6) that the bidding was not bona fide; and (7) that the sale was at an undervalue.

I have dealt with (5) and (7), and I now hold that the bidding was bona fide, and thereby dispose of (6).

The following cases were cited . . . by Mr. Maclennan for plaintiff: McDonald v. Cameron, 13 Gr. 84; Fitzgibbon v. Duggan, 11 Gr. 188; Bebee v. Begbe, 6 Moo. Ind. App. 510; Malloch v. Plunkett, 9 Gr. 556.

Mr. Pringle for defendant cited Patterson v. Todd, 24 U. C. R. 296; Osborne v. Kerr, 17 U. C. R. 134; Delisle v. Dewitt, 18 U. C. R. 155; Lee v. Howes, 30 U. C. R. 292; Kerr v. Bain, 11 Gr. 423; Re Davis, 17 Gr. 603; Chalmers v. Pigott, 11 Gr. 475; and relied also upon the cases cited for plaintiff.

The rule seems to be that a purchaser, even though he be execution creditor, is not affected by such irregularities as are complained of here unless (in the case of an execution creditor) he interferes with the conduct of the sale by the sheriff, and the result of such interference

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is that the sale is not properly advertised or conducted, and takes place under circumstances of disadvantage to the debtor. I think that there was no interference with the sheriff by the purchaser, and further that the sale did not take place under any circumstances of disadvantage to the debtor, and that the advertisement was sufficient, and the conduct of the sale unexceptionable.

Even if the sale were to be set aside, the land must be held by defendant "as a security for the amount of the execution with costs and expenses:" McDonald v. Cameron, 13 Gr. at p. 103. And, taking the view most favourable to plaintiff, defendant by her agreement with the bank is entitled to hold so much of the judgment as is the balance after deducting the proceeds of the property placed by plaintiff in the hands of the bank in British Columbia and in their hands at the time of the agreement. Plaintiff has, herself, with a full knowledge of all the facts, settled the amount to be received from her property by the bank by arranging and carrying out a release of this property for $2,000; and she cannot be heard to say that the amount to be deducted from the total judgment, to arrive at the interest of defendant in the judgment, is in excess of $2,000. Defendant thus has an interest in the judgment . . . amounting to $6,404.83 and interest from 26th March, 1906.

Whatever claim plaintiff might make against the bank . . . (and this judgment will be without prejudice to any such claim), it seems to me that what defendant got was the right to every dollar of the judgment except what might be realized out of the British Columbia property. She may be considered as taking the chance of this amount being more or being less, and paying $3,500 on such chance.

Defendant offered in open Court and formally to accept $6,000, but plaintiff refused to pay more than $3,500 and interest, less the costs of the action. I think plaintiff cannot succeed in reducing the amount for which the land is security in any case to less than has been offered.

But I think there is another ground upon which plaintiff must fail. With a full knowledge of all the facts she participated in the proceeds of the sale. This is a ratification of the sale. It is clear that, whatever irregularities may exist, ratification by the debtor will be sufficient to

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validate the sale: Doe d. Bissett v. McLeod, 3 U. C. R. 297.

. . .

[Reference to Clark v. Phinney, 25 S. C. R. 633.]

Action dismissed with costs.

JANUARY 14TH, 1907.

DIVISIONAL COURT.

EMPEY v. FICK.

Parent and Child—Conveyance of Farm by Father to Daughters—Agreement for Maintenance—Action to Set Aside—Evidence—Mental Capacity—Improvidence—Lack of Independent Advice.

Appeal by defendants from judgment of CLUTE, J., at the trial at Woodstock, in favour of plaintiff in an action to set aside a conveyance to defendants, two of the daughters of David Empey, deceased, by the deceased, of a 100 acre farm in the county of Oxford, upon the ground that the deceased made a gift of the farm to these two daughters, to the exclusion of the rest of his family, without independent advice and improvidently.

W. M. Douglas, K.C., and W. C. Brown, Tilsonburg, for defendants.

J. S. McKay, Woodstock, and R. McKay, for plaintiff.

The judgment of the Court (BOYD, C., MACLAREN, J.A., MABEE, J.), was delivered by

BOYD, C.:—The transaction here impeached was substantially such a one as was under the consideration of the Court in Re Johnson, 20 Ch. D. 389, where an aged and bed-ridden woman conveyed all her farm property to two daughters, who were to pay the debts in connection with the land, and to provide the mother during her life with a house, food, clothes, and medical or other attendance, in such a manner as she had been accustomed to. This was upheld as against creditors, and it was characterized by Mr. Justice Fry as "a perfectly honestly intended family arrangement:" p. 396.

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The trial Judge in this case interfered with reluctance, upon the ground that sufficient evidence was not given to support the transaction. He gives credit to the testimony of the daughters benefited, and speaks of their demeanour in the witness box as "frank and fair," but regrets that he feels compelled to set aside the conveyance. Though the case is very close to the boundary, I think what was done may be upheld without doing violence to any established rules.

The father was 81 when he died; when he made the disposition of his property in 1901, he was 77 years of age. The property conveyed was worth $5,000, subject to a mortgage at first for $1,600 and afterwards raised to $2,500 in order to pay off debts and obligations by the daughters, and it was charged with the maintenance of father and mother during life, and also with a benefaction of $200 to the youngest daughter Elva.

The father had sustained an injury by being thrown from a horse in 1895, and, though greatly prostrated physically and mentally for some months, he ultimately made a very fair recovery, and was restored to mental competence, so that he passed a successful examination on this head before two doctors, who examined him, at the request of his sons, in the spring of 1901. His physical condition induced him to give a power of attorney to his daughter Laura to transact his business—he could not be bothered with its details—and it was this which probably led to the sons making investigation as to his condition. The inquisition appears to have been very distasteful to the father. He spoke of it as a trouble and disturbance, that they were trying to drive him crazy, and take him away, and that they need never expect anything from him. The physicians who examined him in May, 1901, agree in the report (which is in writing), "that he is a man who understood right from wrong—somewhat defective memory, and that he could be easily influenced, but that he understands what he is doing and can so direct that his wishes may be properly carried out." Dr. Welford, who was also examined for the plaintiff, supplements this by saying that he would not reply till he understood, and all his replies were in keeping with a man who understood; several of his replies smart and intelligent; they talked to him of selling and conveying land, and he quite understood about it. Asked as to management of farm by his daughters and whether he wished

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any change and he said he was satisfied; he knew almost to the number of the square feet of land he had. . . . I think he would properly convey as a rational man would.

The family physician was examined for the defence, and said that his mental condition was not impaired after that time and up till his death. This man, Dr. Lankester, says that he would know property and what he was doing with it, and that he would converse intelligently and was competent to make a deed down to the last. He does not agree with the opinion of Dr. Welford that he could be easily influenced; he was not easily influenced. In response to the Judge he say, in difficult matters, if he was irritated or bothered to the point of nervous exhaustion, he might perhaps yield a point if severely pressed upon him, and might not be able to resist continued importunity. His senses were in good active condition, sight, speech, hearing. A fairly well educated man, who read a great deal, and was naturally of shrewd intelligence.

His general character was not changed after the recovery from his injury. He was described by one who knew him best—his wife—as a man who was always desirous to keep his word and promise—a man who would have his own way—one who was not to be coaxed or persuaded or influenced to do what he did not wish to do.

The result of the decision in appeal is to leave the property to be divided as upon an intestacy, and it certainly runs counter to the clear and frequently expressed wishes of the deceased. He said time and again and down to the time of the impeached transaction that he meant to give his property to those who took care of him, and that was his daughters, who lived with him to the end, and not to his sons, with whose conduct he was not satisfied (and probably not without good reason), as the evidence indicates, and the trial Judge comments upon. His expressed intention was not to make a will (as his wife tells us), and he well understood the effect of a deed as distinguished from a will.

The general intention as to the disposal of his farm seems to have taken more distinct form after the visit of the physicians in 1901, and in August of that year he spoke to his daughters and gave them to understand that papers might be prepared to secure the farm to them, and to him and his wife a comfortable home and support for

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the rest of their lives. As carried out in the documents impeached, the scheme does not appear to be improvident, but sensible and prudent—having regard to the fact that he knew his daughters well and had long lived with them upon satisfactory relations both as to the management of the place and in their personal care for the comfort of their parents. The daughters personally undertook to support the parents in a home upon the lands, and this was made an express charge upon the property. The deed was also given in consideration of past services which had been rendered for many years without money compensation. The documents were prepared by one who had been solicitor for the father, and were laid in a place, to which the father had access, where such papers were kept. The papers were in accordance with his instructions, as the daughter says, and they were not signed for a considerable time after they were brought to the house. (The registration of them is in March, 1902.) He had, therefore, plenty of leisure to consider them—had sufficient understanding to know their meaning and purport, and he was not solicited to execute them. That appears to have been done of his own motion voluntarily and deliberately; he appeared one day with them in the dining room, bringing them in, and sitting down read them through, and then he and his wife signed their names in the presence of the hired man and one daughter—not the one who had brought the papers to the house. The other daughter coming in afterwards, all were signed in the presence of the same witness. The daughter says that the father suggested the gift to Elva of $200, and this clause is written into the end of the typewritten agreement —though no evidence is given when it was added, but it was before execution, and is initialled by the witness. The contents and purport of these papers had been talked over shortly before signing between the father and mother and the two daughters. If it be that the old man was susceptible of being swayed by importunity, there is no evidence that any such pressure or solicitation was used in order to procure or induce his signature. The disposition of property was a reasonable one to make; it was entered upon without haste or secrecy or importunity—it was carried out in accordance with the often expressed intention of the father continued down to the time of its completion; and for 4 years thereafter the fruits of it were enjoyed by

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the parents without any evidence of discontent or dissatisfaction till the death of the father. Even now the mother adheres to and approves of the arrangement, which appears to have been disturbed without any adequate warning or notice given to her. She is not a party to the record—nor is the younger sister from whom the donation of $200 has been taken ex parte.

The evidence satisfies me that the father understood what was being done, and approved of it afterwards till the day of his death. This is a fact of great significance, in the face of which the family arrangement should not lightly be disturbed. See Phillipson v. King, 31 Beav. 631. The tests which were laid down in Cork v. Lambton, 15 Beav. 634, appear to my mind to co-exist in this case, viz., that the transaction was righteous or just and that the documents were executed voluntarily and deliberately with knowledge of their nature and effect.

The advice of an independent solicitor or other person is not a sine qua non, if it is otherwise made to appear that the transaction was not promoted or obtained by undue influence, and is in itself a reasonable one, having regard to all the circumstances of the case.

My judgment would be to affirm the transaction, restore the deed, and agreement, and dismiss the action with costs.

RIDDELL, J. JANUARY 15TH, 1907.

TRIAL.

McKINNON v. GILLARD No. 1.

McKINNON v. GILLARD No. 2.

GILLARD v. McKINNON.

GILLARD v. CUTHBERT.

Fraudulent Conveyance—Intent to Defeat Creditors—Marriage Settlement—Evidence of Fraud—Inferences—Conveyance by Husband to Wife—Pretended Consideration—Dower in other Properties—Value of Land—Charges thereon—Will—Precatory Trust—Gift of Cattle—Crops Grown on Land Conveyed—Seizure under Execution—Interpleader Issues—Evidence—Admissibility—Depositions of Parties in other Actions.

Interpleader issues and actions by execution creditors to set aside conveyances.

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G. H. Watson, K.C., and F. T. Costello, Alexandria, for plaintiff in the first two cases and for defendant in the latter two.

F. E. Hodgins, K.C., and G. G. McPherson, K.C., for defendant in the first two actions and for plaintiff in latter two.

RIDDELL, J.:—Alexander A. McKinnon in 1903 was the owner of the east half of lot 36 in the 3rd concession of the township of Lochiel, less some 10 acres; and he was in that year living upon this land (which may conveniently be called the homestead) with his family—his wife Jennie McKinnon, about 53 years of age, who, being a widow at the time, became the second wife of Alexander A. McKinnon about 1900; a son, John A. McKinnon, son of a former wife, and then a young man rather inclined to be "reckless," that is, to indulge in intoxicants occasionally; and a sister, Margery McKinnon, of about 65 or 66 years of age. To the homestead the elder McKinnon was very much attached, both he and his father having been born and having lived all their lives upon the place, and his grandfather having came there an immigrant from another land when a mere lad, and having lived there the remainder of his days. The son John was the owner of the north 90 acres of the west half of the same lot. This had also been in the family for a long time. John had received it by deed, apparently voluntary, from his brother Donald, who had received it under the will of his great-uncle Ronald McKinnon. Alexander was the owner also of the south 15 acres of the west half of lot No. 36 in the 3rd concession and of the south half of lot No. 35 in the 4th concession of the same township. In December, 1903, one Duncan J. McKinnon, who was a clerk in Kingston and a nephew of Alexander, having "gone through" $11,000 of his employer's money, came to the homestead, and there induced Alexander and John to make a promissory note for $11,000 due one year after date with interest at 6 per cent. per annum. He assured them that he would pay the liability himself, and represented that he had or would have his life insured for $10,000 or more. The insurance premium of $800, which it was represented it would take to keep the policy alive, Duncan agreed to pay himself, but he induced Alexander and John to sign a guaranty that

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the amount of the premium should be paid. This was about the 18th or 19th December. Almost immediately after the "papers" were signed, Alexander became anxious about the note, went to Kingston, and used all his endeavours to prevent the note being negotiated. It appeared that the note had not been disposed of in Kingston. About 22nd December Duncan J. met John, and was taken by John to the homestead. In conversation with Alexander he told him that he had left the papers with one Ballantyne in Montreal, and that it would be easy enough to get them back. Thereupon Alexander and Duncan went to Montreal, but found that Ballantyne had gone to Stratford. Duncan sent a telegram to Ballantyne at Stratford to return the papers. It appears, however, that Ballantyne had negotiated the note with Gillard, and thus Alexander came home disappointed; and at this time, beyond question, there was a good deal of excitement in the family over the failure of Alexander to get back the papers. Every time Duncan was seen about the matter, then and for some time after, he said they "would never have to pay a cent—it would never be shoved." It was known for a certainty shortly after that Ballantyne had got money on the note.

John had in 1902 become engaged (for the second time) to be married to Margaret Cuthbert, now his wife; and the wedding day had, long before December, 1903, been fixed for 19th January, 1904.

On 16th January, 1904, a marriage settlement was entered into by John and Margaret Cuthbert—the brother of the lady, Donald Cuthbert, being the trustee. This settlement covered all the land mentioned as belonging to John; and John had no other property of any kind. After the wedding, 19th January, 1904, John and his bride went to live with Alexander in the homestead, and continued till the following spring, and about May, 1904, they went to the land covered by the marriage settlement, and have resided there practically ever since. John had a team of horses of his own, given him by his father, and Alexander in May, 1904, gave to his daughter-in-law, now Margaret McKinnon, 4 milch cows and 2 young heifers. The farm has been conducted by John much, if not quite, as though it was his own. On 29th February, 1904, Alexander McKinnon conveyed (Jane McKinnon joining to bar her dower) to one George R. Ross, in consideration of $1,050,

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the south half of lot No. 35 in the 4th concession; and on 2nd March, 1904, he also conveyed (his wife joining to bar dower) to one William Ritchie, in consideration of $750, the 15 acre lot. Having thus denuded himself of all his property with the exception of the homestead and the usual farm implements and farm stock (amounting to a few hundred dollars), he on 2nd March, 1904, conveyed to his wife Jennie the homestead, the alleged consideration being her joining in the other two deeds to bar her dower.

In December, 1904, the note having become due, an action was brought by William Gillard against Duncan J., Alexander A., and John McKinnon, two other members of the family, and two others who were friends. Judgment having been obtained by default, the sheriff seized under a writ of fieri facias, tested 18th January, 1905, and apparently as the goods of John McKinnon, the 6 cattle which had been given by Alexander to his daughter-in-law, two heifers, the offspring of certain of these, and also some oats, straw, and hay, produce in 1904 of the farm mentioned in the marriage settlement. These are the goods the subject of the interpleader issue which is No. 1 of these four cases.

This judgment was set aside, so far as to allow defendants in to defend, but stood as security.

Thereupon defendants entered an appearance, and the action went on to trial. It was tried before my brother Britton and a jury at Stratford on 19th-21st March, 1906, and resulted in a judgment for plaintiff for $12,365.92 and costs. A writ of fieri facias was issued upon this judgment, tested 6th October, 1906, and under this writ were seized, apparently as being the property of John McKinnon, 6 cows, being certain of the cattle which had been already seized, and some wheat, barley, oats, hay, and straw, the produce of the farm during the years 1905 and 1906. These goods are the subject matter of the interpleader issue case No. 2. In both these Margaret McKinnon is plaintiff, and the execution creditor, William Gillard, is defendant, and the form of the issue is as follows: "The plaintiff affirms and the defendant denies that certain goods . . . in and about a certain farm in the occupation of the plaintiff (describing it) seized in execution by the sheriff . . under a writ of fieri facias dated on or about (giving the date of the teste) and issued out of the High Court of

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Justice directed to the said sheriff for the having in execution of a judgment of that Court recovered by the said William Gillard, in an action at his suit against D. J. McKinnon, Donald McKinnon, A. A. McKinnon, G. A. McKinnon, John A. McKinnon, James D. McGillis, and John A. McRae, were at the time of the said seizure the property of Margaret McKinnon as against the said William Gillard," etc.

Action No. 3 is an action by the execution creditor against Alexander and Jennie, his wife, to set aside the conveyance of the homestead; while action No. 4 is brought by the execution creditor against John and Margaret, his wife, and also the trustee, to set aside the marriage settlement.

I dispensed with the jury . . I tried all 4 cases together. . . . .

Mr. Hodgins, acting for the execution creditor, desired to prove certain statements made upon other examinations under oath by parties to the various actions, and to do this called the stenographer who had taken the evidence. I ruled that he might do this—and indeed that he must adopt some such method in the case of cross-examination upon affidavits and in examinations for discovery, if they were to be used in actions other than that in which the examination was taken. Con. Rule 461 does not, I think, permit reading in one action the examination for discovery taken in another.

Mr. Watson then contended that if any part of the examination were proved in this way, he was entitled to have the remaining part proved in the same way and put in evidence. I thought that the rule in the Owens case, 2 Br. & Bing. 297, at p. 298, per Abbott, C.J., did not extend this far, but on Mr. Watson assuring me that on more than one occasion it had been so ruled by the late Mr. Justice Street, I decided to admit the evidence, subject to objection, and it was read accordingly. It was mainly that I might have an opportunity of carefully considering the additional evidence so given, and of determining whether such additional evidence in any way modified the conclusion at which I arrived at the close of the argument, that I reserved my decision. Had such been the case, it would be necessary for me to decide whether this

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evidence is admissible, but, as my impressions at the trial are in no way changed by such evidence, it is unnecessary to pass upon that matter. If the case should again arise, Prince v. Samo, 7 A. & E. 627, and the case mentioned above, may require consideration. As at present advised, I think that Prince v. Samo goes to the limit, and the most that could be admitted would be only so much of the same examination as would explain or qualify the matter already before the Court.

Upon all the evidence I find that as regards the cattle these were given by Alexander to his daughter-in-law Margaret, and that John never had any interest in them. If, then, the execution creditor is estopped by the mistake of the sheriff's officer in seizing these as the property of John, she must succeed. But I do not think that that is so. The execution was against the goods of Alexander as well as John, and the issue is the simple one, whether the goods were the goods of Margaret as against the execution creditor. The goods upon seizure are in the custody of the law, and it is well established that where goods are in the custody of the law, a writ of fi. fa. attaches upon them without an actual seizure: Beckman v. Jarvis, 3 U. C. R. 280. Upon the sheriff seizing the goods as being the goods of John, the writ as against Alexander attached upon them as if he had seized under it upon them as goods of Alexander.

The cattle, then, may be, as alleged by the execution creditor, the goods of Alexander.

As to the crops the case is different. If the land be really Margaret's, the case cannot be distinguished from Cooney v. Sheppard, 23 A. R. 4, which should be followed, although perhaps not technically binding upon a Judge at nisi prius.

With these findings, the onus is throughout on the execution creditor. In attacking conveyances and gifts alleged to be fraudulent, it is seldom that the plaintiff can adduce direct evidence of a fraudulent intent; he is driven to proof of facts that would lead the Court to the conclusion that such an intent existed. What has been proved in this case I have partly detailed already, and I now proceed to consider and determine the other facts.

I had an opportunity of observing the demeanour of the witnesses in the box. They who were charged with

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fraud were more than usually intelligent men and women. They may not perhaps at the trial have been making in many cases deliberate and intentional misstatements of what was distinctly remembered as the fact, but I think that very much more reliance is to be placed upon statements made previously, when, perhaps, the pinch of the case was not appreciated. Upon all the evidence I am convinced that all those charged with fraud, Alexander, Jennie, John, and Margaret, early in the transaction and before Christmas knew that a liability of a large amount had been incurred by Alexander and John, and that Alexander had used every means in his power to get rid of this liability, and had failed; that while Duncan J. McKinnon had promised to see to the payment of this himself, they knew that this liability might have to be met by Alexander and John; that they all considered any attempt by the creditor to enforce such a liability as sheer robbery; and that they determined to keep, as far as possible, the lands of Alexander and John in the family.

I find that as to the land of John there was no real bargain between him and Margaret; that, knowing as she did about 4 weeks before the day fixed for the wedding, that her betrothed husband had incurred a liability of some $11,000, the arrangement was made by them that she should pretend to be unwilling to marry him without a marriage settlement; that she did a few days before the day fixed for the wedding make such a pretence, but that she would have married him gladly without any marriage settlement. . .

[Ex p. McBurnie, 1 DeG. M. & G. 446, and Davidson v. McGuire, 27 Gr. 483, distinguished. Reference also to Campion v. Cotton, 17 Ves. 268; Fraser v. Thompson, 1 Giff. 49, 5 Jur. N. S. 669; Colambine v. Penhall, 1 Sm. & Giff. 228; Bulmer v. Hunter, L. R. 8 Eq. 46; White v. Stebbins, 7 U. C. R. 340; Smith v. Moffatt, 28 U. C. R. 486; Mulholland v. Williamson, 12 Gr. 91, 14 Gr. 291; Jackson v. Bowman, 14 Gr. 156; Dalgleish v. McCarty, 19 Gr. 578; Boustead v. Shaw, 27 Gr. 280; Bank of Toronto v. Irwin, 28 Gr. 397; Christie v. Burnett, 10 O. R. 609; Carr v. Corfield, 20 O. R. 218; Stuart v. Thompson, 23 O. R. 503; Tennant v. Gallow, 25 O. R. 56; Davidson v. Maguire, 7 A. R. 98; Hickerson v. Parrington, 18 A. R. 635; Elgin Loan Co. v. Orchard, 7 O. L. R. 695, 3 O. W. R. 781.]

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From all the cases the principle to be laid down is: (1) that marriage is a consideration of the highest kind; (2) that to impeach a settlement made upon the alleged consideration of marriage "it must be shewn that it was either colourable or made with intent on the part of the donee, the intended wife, as well as on the part of the donor, to defeat or hinder creditors:" per Spragge, V.-C. (afterwards C.J.O.), in Mulholland v. Williamson, 12 Gr. at p. 94; (3) that knowledge on the part of the grantee of the insolvent circumstances of the grantor is not sufficient: Hickerson v. Parington, 18 A. R. 635; (4) that the fact that the result of a conveyance is to defeat creditors is not conclusive proof that the intention was fraudulent: Carr v. Corfield, 20 O. R. 218; Ex p. Taylor, 18 Q. B. D. 295; Ex p. Mercer, 17 Q. B. D. 290; In re Holland, [1902] 2 Ch. 360; and (5) "that in each case you must look at the whole of the circumstances surrounding the execution of the conveyance, and then ask yourself whether the conveyance was in fact executed with the intent to delay and defeat creditors:" per Vaughan Williams, L.J., in In re Holland, [1902] 2 Ch. at p. 372.

Of course, since our statute 35 Vict. ch. 11, now R. S. O. 1897 ch. 115, the fact that the conveyance had been executed upon a valuable consideration, and with the intent of actually transferring to and for the benefit of the transferee the interest expressed to be transferred, does not validate the instrument. The dangerous doctrine of Wood v. Dixie, 7 Q. B. 829, so vigorously assailed by Sir John Beverley Robinson in White v. Stevens, 7 U. C. R. at p. 341, referred to and adopted in Smith v. Moffatt, 28 U. C. R. 486, and in Dalgleish v. McCarthy, 19 Gr. 579, need no longer be regarded.

Applying these principles to the facts of the present case, as established by such of the evidence as I accept, I am of opinion that there was the knowledge by grantor and grantee of an indebtedness, which they indeed hoped to escape, but feared might have to be met, and an intent on the part of both to prevent the only property the intended husband had being sacrificed to meet what they—perhaps not unnaturally—thought to be an unjust claim, no better than robbery; that there was no real object other than this in the alleged marriage settlement by any of the parties

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thereto. The result is that this conveyance will be set aside.

As to the conveyance by Alexander to his wife Jennie, I think the same result will follow. The cases cited on this branch were, amongst others, Forrest v. Laycock, 18 Gr. 611; Black v. Fountain, 23 Gr. 174; Morris v. Martin, 19 O. R. 564; Beavis v. Maguire, 7 A. R. 704. The following I find to be the facts. Both parties to the conveyance knew of the liability, hoped it might not, but feared it would, result in Alexander being called on to meet it; both desired and intended to prevent the homestead being sold out of the family, and going to pay this unjust claim; the wife would have barred her dower in the other two pieces of property as soon as the husband really wanted her to do so; and the transaction was not one of contract for valuable consideration, but a simple arrangement made by the husband, acquiesced in by the wife, that the two pieces of property should be sold to others, and the homestead put in her name. The intent is, I think, proved, and the conveyance cannot stand.

Had it been necessary to consider the value of the homestead, and to consider the reasonableness of such a contract, it is, I think, obvious that if the homestead were worth over $900, she was getting more than her dower, even though her husband were to die at once. For example, suppose the homestead were worth $1,200, the whole value of the land is $1,050 + $750 + $1,250 = $3,000, of which one-third is $1,000. This is all that she could get, even though her husband died at once without a will, and she elected under the statute. But for this, or rather for the possibility of getting this at some time, she is said to receive $1,200. On no shewing can the land be made worth less than about $2,500 or $3,000, even charged as it is with the maintenance of Margery.

As to the alleged charge in favour of the brothers, if it were necessary to consider this, it would seem that this would not under the recent authorities be considered effective as a charge. The provisions of the will under which Alexander holds his land are as follows: (1) A devise to Alexander of the 90 acres. (2) Subject to the maintenance and support of the widow (now dead) and of Margery (now 65 or 66 years old). (3) "In the event of any of my sons at any time becoming disabled through sickness or other

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causes, I desire that they shall have a home with my said son Alexander until they are sufficiently recovered and able to provide for themselves." It would appear that under the latest authorities this would be considered a mere expression of desire, "a pious wish," and not a precatory trust: In re Diggles, 39 Ch. D. 253; In re Hamilton, [1895] 2 Ch. 370, 374; In re Williams, [1897] 2 Ch. 12; Hill v. Hill, [1897] 1 Q. B. 483, 493; In re Hanbury, [1904] 1 Ch. 415, 419; In re Oldfield, [1904] 1 Ch. 549. But I do not pursue this inquiry. I do not think the question of relative value ever entered into the mind of husband or wife.

As to the 6 cattle and their offspring, I have had some doubt what disposition I should make of the case. But upon consideration of the whole case and of the circumstances preceding the gift, I think the same intent characterized the parties to that transaction.

The issues in the two interpleader matters will be found in favour of defendant. In the two other actions judgment will be entered for plaintiff as asked. Costs will follow the event. If there be any costs applicable solely to the question of the ownership of the cattle, these will not be taxed to either party.

TEETZEL, J. JANUARY 15TH, 1907.

TRIAL.

ST. CATHARINES AND NIAGARA POWER AND FUEL CO. v. THOROLD NATURAL GAS CO.

Contract—Construction—Supply of Natural Gas—Covenant Restricting Supply to Others than Plaintiffs—Breach—Exceptions—Supply to Consumers' Company.

Action for an injunction restraining defendants the Thorold Natural Gas Co. from purchasing or receiving natural gas from the pipe line of defendants the Niagara Peninsula Power and Gas Co., and restraining the latter company from selling, supplying, or delivering to the Thorold Company any natural gas from their lines.

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The plaintiff company were organized to sell and distribute natural gas to their customers in St. Catharines and surrounding municipalities; the other plaintiffs were shareholders therein and also in the Niagara Peninsula Co. (defendants), organized to develop natural gas fields and sell natural gas in the county of Welland and elsewhere; and the defendants the Thorold Natural Gas Co. were organized to supply natural gas within the town of Thorold.

W. Nesbitt, K.C., for plaintiffs.

W. H. Blake, K.C., for defendants the Niagara Peninsula Power and Gas Co.

C. A. Moss, for the other defendants.

TEETZEL, J.:—Plaintiffs' rights depend upon the construction to be placed upon two covenants on the part of the Niagara Co. in an agreement between that company and plaintiffs, dated 24th September, 1904. The first covenant, after providing for the laying of a main pipe from the Niagara Co.'s gas field to a point not more than a mile from the limits of St. Catharines, and for making connection with the pipe line of the plaintiff company, and installing an adequate regulator at the point of connection, proceeds as follows: "And will supply to the party of the second part (plaintiffs) continuously (unless for accident or other unforeseen occurrences) for a period of 8 years from 15th November next (or such earlier or later date as connection with the pipe line of the party of the second part is made), all the natural gas supply which it now has or which it hereafter gets under its control, except such as it requires for supplying demand for domestic heating and cooking purposes only in the town of Thorold, and no other towns or villages, and for use in lighting the Welland canal, should the party of the first part at any time make a contract for such purposes, and for domestic consumers at the gas fields and along the line of the pipe line . . . without consent of the party of the second part. . . ."

The other covenant reads: "2. The party of the first part (the Niagara Co.) will not during the term of this agreement supply any consumer in the city of St. Catharines or the villages of Merritton and Port Dalhousie, except as

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aforesaid for the lighting the Welland canal, nor will the party of the first part dispose of any gas to any other company or persons for the purpose of supplying such places or any other places or consumers except Thorold and along pipe lines, as set out in the next preceding paragraph."

Shortly before the commencement of this action defendants the Niagara Co. entered into an agreement with defendants the Thorold Co. to supply such natural gas as the latter might require for the purpose of "supplying demand for domestic heating and cooking purposes in the town of Thorold."

Under this agreement, the Niagara Co. assign all their rights, claims, and demands arising under contracts with subscribers in Thorold, the intention of both parties plainly being that the Niagara Co. shall not supply gas in Thorold directly to consumers, but that the Thorold Co. shall do so through their own service lines. . . .

The contention of plaintiffs is that, reading the above covenants in the light of the whole agreement and the circumstances under which it was entered into, the intention of both parties was that the Niagara Co. should, by laying their own main and service pipes in Thorold, directly supply the consumers in that town with natural gas, and that to make an agreement with another company to supply gas at a fixed rate per thousand for distribution among customers to be secured by the intermediate company, was not within the exception provided for in each of the above covenants, and therefore a breach thereof. . . .

It is to be noted, as against this contention, that, besides absence of any express covenant providing for it, the agreement contains a provision limiting the amount that should be expended by the Niagara Co. for that purpose in the event of their deciding to lay pipes in Thorold.

Looking at the words in the first covenant above cited, "except such as it requires for supplying demand for domestic heating and cooking purposes only in the town of Thorold," I think it is plain that the parties only had in mind the question of the amount of gas likely to be required to supply such demand, and not the method by which it was

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to be supplied, that is, whether by the company direct to consumers or through an intermediate contractor. Nor do I think the negative covenant contains any further evidence of any intention to restrict the Niagara Co. in the enjoyment of the exception by limiting them to the right of merely supplying gas directly to consumers in Thorold. The sole purpose of the latter part of this covenant is to restrain defendants from supplying other demands than those provided for, lest plaintiffs should not get sufficient to supply their own customers. I do not think the language of the covenant is sufficient to prevent the Niagara Co. entering into the agreement in question with the Thorold Co.

In the result, therefore, I am of the opinion that the mode adopted by the Niagara Co. in supplying customers in Thorold is not any breach of the agreement with plaintiffs, and that the interim injunction should be dissolved and the action dismissed with costs. Defendants may have the usual reference as to damages arising from the injunction.

JANUARY 15TH, 1907.

DIVISIONAL COURT.

RE SYLVESTER MANUFACTURING CO. v. BROWN.

Statutes—Retroactivity—6 Edw. VII. ch. 19, sec. 22 (O.)—Procedure—Division Courts—Contract—Provision for Determination of Forum for Possible Actions—Prohibition.

Appeal by plaintiffs from order of FALCONBRIDGE, C.J., 8 O. W. R. 984, for prohibition to a Division Court.

C. A. Moss, for plaintiffs.

A. B. Morine, for defendant.

THE COURT (MULOCK, C.J., TEETZEL, J., ANGLIN, J.), dismissed the appeal with costs.

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JANUARY 15TH, 1907.

DIVISIONAL COURT.

RE KELEHER.

Will—Construction — Devise — Estate — Fee Simple or Life Estate with Executory Devise over—"Die without Lawful Issue"—Death in Lifetime of Testator—Lapsed Devise—Annuities and Legacies Charged on Lands Devised—Payment by Life Tenant — Reimbursement of his Estate — Statute of Limitations.

Appeal by James C. Keleher from order of MEREDITH, C.J., O. W. R. 225, determining certain questions arising upon the will of James Keleher the elder.

The appeal was heard by FALCONBRIDGE, C.J., BRITTON, J., MABEE, J.

W. M. Douglas, K.C., for the appellant.

W. H. Blake, K.C., for James Keleher the younger and Timothy Keheler.

W. E. Middleton, for Sister Ste. Philippe.

MABEE, J.:—I agree with the construction placed upon the will by the Chief Justice of the Common Pleas, 8 O. W. R. 225, and have nothing to add to the reasons given by him for the conclusion reached.

On 4th September notice of appeal from the order was given, and on 22nd September an additional notice of appeal was served, in which an entirely new point was raised, and an alternative position taken that had not been discussed upon the original motion at all. This appeal is by James C. Keleher, as the personal representative of Denis Keleher, and he now asks in the alternative for an order that all sums of money or moneys and legacies paid by Denis Keleher under the will in question, together with interest thereon, be repaid to him, or that they be charged upon the property or the proceeds thereof, or for such further or other order as the Court may deem proper.

The clauses in the will requiring to be considered in connection with this new contention are as follows:—

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"I give, devise, and bequeath unto my son Denis Keleher . . . in fee simple . . . lot 6 . . . to have and to hold the said freehold lands . . . to him the said Denis Keleher, his heirs and assigns forever, subject nevertheless to and charged and chargeable with the annuity or yearly rent charge and other conditions hereinafter mentioned; and I do give, devise, and bequeath unto my wife Johannah Keleher and her assigns for and during the term of her natural life one annuity of £7.10 to be charged on and issuing and payable out of the said freehold lands and other hereditaments before mentioned and devised unto my said son Denis Keleher, and to be paid and payable quarterly from the day of my decease in each and every year. I also give and bequeath to my said wife 6 hundredweights of wheat flour, 40 hundredweights of potatoes, a sufficiency of good fuel or firewood, the grass and hay necessary for one cow, and the possession of the dwelling-house in which I now reside yearly and every year during the term of her natural life . . . the aforesaid flour, potatoes, grass, and hay to be provided and furnished as aforesaid yearly by my said son Denis Keleher. . . . That my said son Denis Keleher shall pay to my said daughter Catharine, if she survive me, and if she do not survive me, but die leaving issue, then to her issue, the sum of £50 to be equally divided amongst the issue, and to be paid in 4 yearly and equal payments of £12.10 each. I also give and bequeath unto my son Timothy Keleher, his heirs or assigns, the sum of £15, to be paid by my son Denis within 3 years after my decease or the decease of my wife, if she survives me. . . . I also give to my son Patrick, his heirs and assigns, £15 to be paid by my said son Denis. . . I also give and bequeath to the heirs of James Sullivan . . . the sum of £10 to be paid by my said son Denis."

Then follows the provision that if Denis should die without lawful issue of his body, the lands should be equally divided between the sons Patrick and Timothy, "on the terms, charges, payments, and conditions hereinbefore mentioned to be imposed upon my said son Denis Keleher."

The material filed states that all the annuities and legacies provided for under the will have been paid and satisfied, and that Denis received the rents of the lot until his death on 12th February, 1906.

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It is now contended that Patrick and Timothy take subject only to their reimbursing the estate of Denis for the payments made by him under the provisions of the will.

Denis must be held to have known the nature of the estate he took under the will, and that in the event of his death without lawful issue of his body the land was to be equally divided between Patrick and Timothy, so that it cannot, I think, be argued that he was discharging these burdens upon the estate under any mistake of title, and there does not appear to me to be anything in the will that would justify him in thinking that he, or rather his estate, was ever to be reimbursed in the event of the land going to Patrick and Timothy. I am unable to see upon what principle of law the Court could make an order of the kind now asked. I think it is clear . . . that the direction that the land should go to Patrick and Timothy on the terms . . . imposed upon Denis, was merely to put it beyond question that he was preserving the benefits provided for the widow and other legatees. These payments were all made many years ago, and if an action were pending at the suit of the representative of Denis for the recovery of these moneys, or for a declaration that he was entitled to a charge upon the estate in the hands of the surviving executor for the sums he paid, I think the Statute of Limitations would be a good answer.

Furthermore, the gift to Denis was "subject to and charged and chargeable with" the payment of these various legacies in question, that is, the lesser estate vested in Denis was charged with their payment, just in the same way as the larger estate would have been had he avoided the contingency upon which the lands were to go to Patrick and Timothy, and I think he must be held to have been making these payments with reference to such estate as he had under the will; that he himself never entertained any idea that such a claim as now advanced could be made; and that the appeal must be dismissed.

Costs out of the estate.

FALCONBRIDGE, C.J., and BRITTON, J., agreed in the result.

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JANUARY 15TH, 1907.

DIVISIONAL COURT.

JAMES v. DOMINION EXPRESS CO.

Carriers—Express Company—Contract—Perishable Goods—Duty to Forward by Fast Train—Gross Negligence—Sub-agents of Carriers—Railway Company—Notice—Local Office of Company—Counterclaim—Express Charges.

Appeal by defendants from judgment of CLUTE, J., in favour of plaintiffs for the recovery of damages for the loss of part of two car-loads of fish shipped by plaintiffs under a contract with defendants, from Selkirk, Manitoba, on 10th October, 1903, to Toronto. The cars arrived in Toronto on 15th October. The trial Judge found that the fish were in fair condition when delivered to defendants at Selkirk, and were partly bad when they arrived at Toronto. The goods were not forwarded by a fast passenger train, but by what is called a stock train.

W. Nesbitt, K.C., and Shirley Denison, for defendants, contended that upon the proper construction of their contract they had done all that was required of them, and were not liable to damages, and also that they were entitled to recover the express charges upon their counterclaim, which was dismissed by the trial Judge.

G. F. Shepley, K.C., and G. H. D. Lee, for plaintiffs.

The judgment of the Court (BOYD, C., MACLAREN, J.A., MABEE, J.), was delivered by

BOYD, C.:—The engagement of the express company, which is an undertaking to forward to the nearest point to destination, implies that a safe and rapid transit will be furnished to the company for the whole distance, and that contract was broken when the perishable goods were transferred to a freight train at Winnipeg, by which delivery was delayed beyond the proper time, according to the usual method of transmission by fast train. Negligence is attributable to this deviation from the usual and proper method of forwarding the goods. The defendants are

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common carriers, and are liable as such for acts of negligence: Martin v. Great Indian Peninsular R. W. Co., L. R. 3 Ex. 9.

The special clause in the receipt that the company shall "not be liable for loss or damage for any cause whatever, unless it be proved to have occurred from the . . . gross negligence of the company or its servants" does not help the situation. According to well settled rules of liberal construction in these carriers' cases, the agencies they employ for the transaction of their business (whether independent lines of railway or not) are all accounted employees, agents, or servants of the contracting company. Every person who, directly or indirectly, is employed by a company as a carrier to do that which the company have engaged to do by themselves or others under them, is a servant. That principle of construction was laid down as early as 1848 in Machu v. London and South Western R. W. Co., 2 Ex. 415, upon a statute which is in pari materia with the language of this contract; and that canon has been recognized as of authority in the subsequent cases: see Stephens v. London and South Western R. W. Co., 18 Q. B. D. 121, 124. It is adopted as expressive of the law in the latest compilation of law in the United States: see 6 Cyc. p. 369.

What occurred in this case in the handling of the fish cars was "gross negligence," as defined by the Courts—meaning that want of reasonable care, skill, and expedition which may properly be expected: see Beal v. South Devon R. W. Co., 3 H. & C. 337.

The alleged want of notice at the local office should not prevail: the language is not clear as to what is meant by "at this office." It is amply satisfied, so far as the practical and substantial information as to the loss is called for, by communicating with the head office of the company. The right of recovery should not be defeated on this narrow ground, having regard to the ambiguity of the terms: Miles v. Haslehurst, 23 Times L. R. 142.

The right on the counterclaim to recover for the express charges on the other car of damaged fish may well be left for discussion when the question is agitated as to the right to recover for that damage. I agree that the

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counterclaim as to this should be dismissed without costs and without prejudice to its recovery against the proper party.

The judgment should be affirmed with costs.

JANUARY 15TH, 1907.

DIVISIONAL COURT.

BOHAN v. GALBRAITH.

Vendor and Purchaser—Contract for Sale of Land—Specific Performance—Correspondence—Agent—Completion of Contract—Subsequent Formal Offer to Purchase and Refusal —Effect of.

Appeal by defendant from judgment of TEETZEL, J., 8 O. W. R. 559, in favour of plaintiff in an action for specific performance.

W. E. Middleton, for defendant.

J. A. Paterson, K.C., for plaintiff.

The judgment of the Court (BOYD, C., MACLAREN, J.A., MABEE, J.), was delivered by

MACLAREN, J.A.:—The defendant, a Toronto solicitor, has been residing for some time in California. He owns some property in Yonge street in the city of Toronto, H. Graham & Son being his agents for the collection of the rents. He was here in the summer of 1905, and discussed the sale of the property, arranging that Graham should send him any offers he might receive.

Plaintiff on 2nd December, 1905, filled up and signed a printed form offering $13,000, naming terms of payment, and other details. This was sent to Graham by defendant, who refused it. Plaintiff then signed another offer, dated 9th December, of $14.000 on a similar form, half cash, balance payable by instalments, offer to be accepted by 23rd December, sale to be completed by 1st January. This was sent by Graham to defendant, who, on 15th December wrote to Graham: "Your offer from Mr. Bohan of $14,000

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for Yonge street is not what I wish to accept. I told you last summer I would not let it go for less than that amount, but I would not care to sell it on payments . . Therefore, if Mr. Bohan wants the property, he can get his own loan, as suggested in your first letter, and pay me $14,000 cash, or I will take a straight mortgage for 5 years at 6 per cent. payable half-yearly. If he can get it at 5 per cent. himself, he is welcome to do so elsewhere. If he borrows from the same party who had the loan before, his expenses would be small and the title searched free of expense. Please consider this final."

On 20th December Graham, on instructions from plaintiff, wrote defendant as follows: "Your favour of 15th instant to hand; in reply we beg to inform you that Mr. Bohan accepts the terms named therein, and will pay the $14,000 in cash. We enclose the blank deed in duplicate, which you can fill out and forward with instructions how to dispose of proceeds. Kindly forward title papers or inform us where they are to be obtained. We are glad to get such a good offer." On receipt of this letter, defendant took the offer sent him on 9th December, and altered it to agree with this letter of 20th December, changing the date for acceptance from 23rd December to 1st January, and the date for closing from 1st January to 1st February, and sent it to Graham, with this note: "You forgot to send amended offer from Mr. Bohan. I have returned this for signature when re-written."

The offer was re-engrossed in accordance with defendant's alterations, was dated 2nd January, 1906, signed by plaintiff, and sent on 3rd January by Graham to defendant with this letter: "As you request, we have had amended offer made out and signed by Mr. Bohan, and forward the same for your acceptance. We did not think this necessary, as if title papers had been forwarded, Mr. Bohan was ready to pay over the money at any time." On 9th January defendant wrote Graham declining to accept this offer.

Teetzel, J., was of opinion that defendant's letter of 15th December above quoted was an offer to sell to plaintiff for the price named, and this having been unconditionally accepted by plaintiff in the letter of 20th December, there was a binding contract from which defendant was not entitled to withdraw on account of what took place subsequently.

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With great respect, I find myself unable to take this view. The course of dealing betwen the parties shews that defendant always intended that the business should be done by way of a formal offer in writing embodying all the terms, and an acceptance; and I do not think that his letter of 15th December can be taken as a waiver or departure from this method of procedure. As a solicitor he would have present to his mind the risk he would run as to title, &c., if he made an open contract such as this would have been, if the claim now put forward by plaintiff is well founded. No doubt a contract can sometimes under the Statute of Frauds be spelt out from correspondence even, when a party is not aware that he is making a binding contract. But, as said by Lord Selborne in Jarvis v. Berridge, L. R. 8 Ch. at p. 360, "The statute does not make any signed instrument a valid contract, by reason of the signature, if it is not such according to the good faith and real intention of the parties." Even if there had been nothing subsequent to the letter of 20th December, I would have had difficulty in coming to the conclusion that there was then a binding contract. There is in the letter of 15th December no offer in terms to sell to plaintiff, and it is not wholly without significance that it was not addressed to plaintiff, but to defendant's own agent, and may be looked upon as intended partly to govern the agent as to what kind of an offer he might thereafter submit for defendant's acceptance. It is also to be observed that the letter of 20th December itself speaks of its being an "offer" from plaintiff. The case is, no doubt, near the line; but the weight of authority seems to be on the side of defendant. In order to succeed plaintiff must establish his case; I think he has fallen short of this.

Plaintiff's case here does not appear to be so strong as that of the plaintiffs in Harvey v. Facey, [1893] A. C. 552.

. . . .

I also think that the plaintiff in Johnston v. Rogers, 30 O. R. 150, had a stronger case. . . .

But, under the circumstances, I do not think we can properly take the letters of 15th and 20th December and dissociate them entirely from what took place subsequently. In his written offer of 2nd January, plaintiff in-

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serted as one of the terms, "This offer to be accepted by 15th January, otherwise void." It was not so accepted, and consequently by his own proposition it is void. It is the contract which would have been made if this offer of plaintiff had been accepted which he is now seeking to enforce by his present action. The full terms as contemplated by the parties I do not find elsewhere. Even if there had been a completed contract under the letters of 15th and 20th December, which I am unable to find, it might be argued that plaintiff waived it, and re-opened the question. But it is not necessary to go so far, and I prefer to treat the offer of 2nd January rather as evidence of a recognition by plaintiff that the defendant was entitled to take the position he had done, and to insist on concluding the negotiations on the line on which they had begun, namely, in the form of a formal offer in writing by the proposed purchaser and an acceptance by the vendor.

For these reasons I am of opinion that the appeal should be allowed and plaintiff's action dismissed; but under the circumstances I do not think there should be any costs either here or in the Court below.

CARTWRIGHT, MASTER. JANUARY 16TH, 1907.

CHAMBERS.

IMPERIAL TRUSTS CO. v. NEW YORK SECURITIES CO.

Mortgage—Redemption—Extension of Time—Terms—Costs.

Motion by defendants for further time to redeem, after an order extending the time for redemption, affirmed by FALCONBRIDGE, C.J., ante 45.

G. H. Kilmer, for defendants.

W. H. Lockhart Gordon, for plaintiffs.

THE MASTER:—The mortgage was made 13 years ago for $5,000. With taxes, interest, and costs, the total now due is about $9,300. The property is an iron mine in the

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county of Hastings, of uncertain value, and not readily saleable.

In Holford v. Yate, 2 K. & J. 677, the time was extended for 3 months, though the Vice-Chancellor said "the case is very weak." There the defendant was required within 4 weeks to reduce the mortgage to the amount originally advanced by the plaintiff.

Here these terms would be too severe. Defendants, however, must pay on account of arrears $1,500 on or before 11th February next, as a condition of having the time for redemption extended until 17th April. Interest must be paid upon the aggregate amount due at this date. The exact sum will be settled by the Clerk in Chambers and inserted in the order so as to render any further account unnecessary.

The costs of this motion, fixed at $20, are to be paid within a week, and before the issue of this order. In default of this being done or of the payment of the $1,500 at the time named, defendants are to be absolutely foreclosed.

MABEE, J. JANUARY 16TH, 1907.

CHAMBERS.

RE BECK MANUFACTURING CO.

Water and Watercourses—Logs Floated over Stream—Tolls—Summary Order Fixing—Past Tolls—Mandamus.

Motion by the Beck Manufacturing Co. for a mandamus to the Judge of the District Court of Nipissing to compel him to fix certain tolls.

A. B. Morine, for the applicants.

A. G. F. Lawrence, for the Ontario Lumber Co.

MABEE, J.:—If the proceedings are not in proper form, the applicants may amend the same as they may be advised, if this becomes necessary. The respondents' counsel did not object to this.

If the construction of the section of the Act in question, R. S. O. 1897 ch. 73, sec. 13, was open to me, I should

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have no hesitation in holding that the District Court Judge's finding or order fixing the tolls need not be limited to future tolls. I think it is perfectly open, once the amount is fixed, for recovery to be had for past as well as future tolls. I think, however, I am clearly bound, as was the District Court Judge, by the judgment of a Divisional Court in Re Beck Manufacturing Co. and Ontario Lumber Co., 3 O. W. R. 333.

Mr. Morine argued with much force that this decision had been overruled by the Court of Appeal in Beck Manufacturing Co. v. Ontario Lumber Co., 12 O. L. R. 163, 8 O. W. R. 35. The question decided by the Divisional Court was not expressly before the Court of Appeal, and, notwithstanding that the judgment of the former has been greatly shattered, it still stands.

In this view, I have no alternative but to refuse the mandamus asked for.

The respondents are entitled to their costs of opposing the motion.

MABEE, J. JANUARY 16TH, 1907.

WEEKLY COURT.

RE GREENWOOD.

Will—Devise—Predecease of Devisee—Estate or Interest—Liability for Debts of Devisee.

Motion by the executors of William Greenwood, deceased, for an order under Rule 938, determining a question arising upon the administration of the estate.

A. L. Baird, Brantford, for the executors.

James Harley, K.C., for creditors.

F. W. Harcourt, for infants.

MABEE, J.:—Robinson Greenwood died on 1st December, 1906, and under his will certain lands are given to William Greenwood, subject to defined legacies and charges. William Greenwood died on 10th November, 1906, leaving

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issue, and his executors ask if the estate given to William under the will of Robinson may be resorted to for the payment of the debts of the former, the estate, apart from the gift from Robinson, being insufficient for such purpose.

The estate given to William was not determinable at or before his death, and he left issue surviving Robinson. Section 36 of the Wills Act, R. S. O. 1897 ch. 128, applies, and this is in terms the same as sec. 33 of the Imperial Act 1 Vict. ch. 26. The issue are not substituted for the original donee, but the gift is to him absolutely as though he had survived the testator: Williams, 9th ed., p. 1085.

These lands form part of the estate of William in the hands of his executors, and of course are liable for the debts of the deceased.

Costs out of the estate.

JANUARY 16TH, 1907.

DIVISIONAL COURT.

MERCIER v. CAMPBELL.

Contract—Sale of Land—Contract not Enforceable under Statute of Frauds—Clause of Contract Binding Purchaser to Pay Fixed Sum if Agreement not Carried out—Alternative Promise—Enforcement—County Court Appeal—Court of Final Resort—Decision of Court of Co-ordinate Jurisdiction—Judicature Act, sec. 81 (2).

Appeal by plaintiff from judgment of Judge of County Court of Prescott and Russell dismissing an action brought to recover $300, the amount fixed by an agreement between the parties for the purchase by defendant of plaintiff's hotel, which provided that if for any reason defendant did not carry out his agreement he should pay plaintiff $300, the same amount to be paid by plaintiff if she did not fulfil the contract. Defendant refused to accept the title or do anything towards carrying out the purchase. Plaintiff did not attempt to enforce the agreement by an action for specific performance, but brought the action in the County Court for the $300.

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The County Court Judge decided: (1) that the contract for the sale of the land was not enforceable by reason of the provisions of the Statute of Frauds; and (2) that, as the agreement to pay the sum of $300 was in the same contract, and an alternative agreement, it could not be enforced.

The appeal was heard by FALCONBRIDGE, C.J., BRITTON, J., RIDDELL, J.

J. A. Macintosh, for plaintiff.

W. E. Middleton, for defendant.

RIDDELL, J.:—As we are the Court of last resort in this matter, we at the hearing called for argument upon the question whether we are bound by the decision of a Divisional Court—it appearing to us that a decision of the Common Pleas Division, hereafter to be referred to, might govern the case.

Mr. Macintosh argued that we were so bound, citing the Ontario Judicature Act, sec. 81 (2), Holmested & Langton, p. 140, but said he had not found any decision in that sense. We have not found any.

Mr. Middleton cited Canadian Bank of Commerce v. Perram, 31 O. R. 116, in which a Divisional Court, sitting as we are in appeal from a County Court, refused to be governed by previous decisions, and held that the Court was bound to exercise an independent judgment. Other cases were cited, decided under the Railway Act, more or less applicable.

I think we must give an independent judgment, and adopt the decision in 31 O. R. Any other conclusion would lead to a dilemma similar to that which has amused students for 20 centuries. The ancient Cretan who asserted so stoutly that "Cretans are always liars" was proved to be a liar whether he told the truth or not. So on plaintiff's contention we are reduced to the paradox that if we are bound by a Divisional Court judgment, we are bound by that in 31 O. R. to hold that we are not bound. On principle, however, I am of the opinion that the section of the Judicature Act cited does not refer to a court of final appeal. It is necessary to consider the case without regard to the decision just referred to.

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As to the first point decided by the County Court Judge, I agree in his conclusion, and to the many cases cited and considered by him simply add Williams v. Lawson, 19 S. C. R. 673, and Green v. Stevenson, 9 O. L. R. 671, 5 O. W. R. 761.

The second point, however, cannot be so easily disposed of. The judgment of the County Court Judge goes through a very large number of text-books and decisions, chiefly American, and the conclusion is reached that the law is correctly stated in Browne's Statute of Frauds, sec. 152. as follows: "A class of contracts . . . namely, those in which a party promises to do one of two or more things, the statute applying to one of the alternative engagements but not to the other, is sometimes referred to the head of contracts in part affected by the statute . . It is manifest that of such alternative engagements, no action will lie upon that one which, if it stood alone, could be enforced as being clear of the Statute of Frauds, because the effect would be to enforce the other, namely, by making the violation of it the ground of action.'

As somewhat similar statement of law is to be found in Sutherland on Damages, sec. 280. . . .

If we found that Knapp v. Carley, 3 O. W. R. 940, the decision of the Common Pleas Divisional Court first referred to above, did clash with all the English authorities, it would be our duty not to follow it. It, therefore, is necessary to examine the authorities.

Browne's statement of the law cited above is based upon the following cases: Goodrich v. Nichols (1797), 2 Root (Conn.) 498, Supreme Court of Connecticut, Litchfield county; Van Alstine v. Wimple (1825), 5 Cow. N. Y. 162; Rice v. Peel (1818), 15 Johns. (N. Y.) 503; Patterson v. Cunningham (1835), 12 Me. 506; Howard v. Brower (1881), 37 Ohio St. 402; Curd v. Weekes (1817), 2 Conn. 302. . . (Discussion and review of these cases.)

Sutherland, sec. 280, cites: Newman v. Perram, 73 Ind. 153; Scott v. Bush (1873), 26 Mich. 418; Weatherby v. Choate (1858), 27 Tex. 272; Kraak v. Fries (1892), 21 S. C. D. C. 100; Levy v. Brush, 45 N. Y. 589; Howland v. Blake, 97 U. S. 628; Mathers v. Scoles (1870), 35 Ind. 1. . . . (Review and discussion of these cases.)

I have gone over with care all the cases cited by the County Court Judge and those cited by Mr. Middleton, and many more; and I find that all the American cases

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upon which they rely depend either (1) upon the principle that if part of an entire contract is void, the whole is void; or (2) a note or promise given for payment if the defendant omits to carry out a contract void by the Statute of Frauds is not enforceable for want of consideration; or (3) the proposed principle that if there be alternative promises, if one cannot be enforced, the other cannot be enforced.

The many cases decided upon the first principle—which is undoubted—so far as they are in point and adverse to plaintiff here, depend upon a misunderstanding of what was actually decided in such cases as Lord Lexington v. Clark, 2 Ventr. 223, and Chater v. Beckett, 7 Taunt. 197. In these cases there was an agreement to pay two sums, such agreement being based upon one consideration. The contract was, therefore, entire, and it was held that if one of these payments could not be enforced, neither could the other. . .

But all the authorities are to the effect that if the contract be not entire, there is no reason why part of it cannot be enforced, though the other part may be void by the common law or by statute. . . . .

[Reference to Wood v. Benson, 2 Cr. & J. 94; Mann v. Nunn, 43 L. J. C. P. 241.]

It seems to me clear that the promise of defendant to pay $300 if he should not carry out his agreement is distinct from the agreement to purchase—it is an alternative. . . . .

[Reference to Mayfield v. Wadely, 2 B. & C. 357; Kerrison v. Cole, 8 East 231; Greene v. Saddington, 7 E. & B. 503; Jeaker v. White, 6 Ex 873; Morgan v. Suffillis, L. R. 6 Ex. 70; Boston v. Boston, [1904] 1 K. B. 124.]

It makes no difference that all the agreements appear in the same document: Kerrison v. Cole, supra; Greene v. Saddington, supra. . . .

[Reference to Romayne v. Sherram (1877), Ir. R. 11 C. L. 146; Mayfield v. Wadsley, 3 B. & C. 357; Boston v. Boston, supra.]

The case nearest the present that I have found is Jeaker v. White, 6 Ex. 873. . . . Compare these with Harman v. Reeve, 18 C. B. 587. . . .

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As to the point taken in several American cases, such as some of those already cited and De Beerski v. Paige, 36 N. Y. 537, that the contract to buy is void, and therefore there can be no consideration—this depends upon the want of discrimination in the use of the words "void" and "voidable." It is thoroughly established that a contract such as this is only voidable, and may, if it be necessary to prove a consideration, be ample.

The County Court Judge seems to consider that there is a difference in principle between a promissory note and an express promise to pay in some other written form. The only difference is that a promissory note imports a consideration, while a simple contract does not. But that simply shifts the onus of proof, and, upon the facts being established, the same principles govern in the one case as in the other. Moreover, in the particular contract, we have a seal, and a consideration is equally inferred in this specialty as in a note. . . .

[Reference to Jones v. Jones, 6 M. & W. 84, 9 L. J. N. S. Ex. 178, 55 Rev. Rep. 521; Speller v. Westlake, 2 B. & Ad. 155; Fraser v. Ryan, 24 A. R. 441, distinguishing the last case.]

The last matter to be considered is the doctrine that in the case of alternative promises, if one cannot be enforced, neither can the other. I find absolutely no trace of any such doctrine in the cases in England or in Ontario. I have examined text-book after text-book, and find no suggestion of such a principle. The case must, we would think, necessarily have arisen and been decided if it had been that there was any foundation for even an argument. The contrary is, I think, laid down in Stevens v. Webb, 7 C. & P. 60. . . .

[Reference also to Lowe v. Peers, 4 Burr. 2225 (distinguishing it); DaCosta v. Davis, 1 B. &. P. 243; Wharton v. King, 2 B. & Ad. 528; More and Bake v. Morecamb, Cro. Eliz. 864; Studholm v. Mandell, 1 Ld. Raym. 279; McIlquhain v. Taylor, [1895] 1 Ch. 53; Baily v. DeCrespigny, L. R. 4 Q. B. 180, 185; Basket v. Basket, 2 Mod. 200; Laughter's Case, 5 Co. 21.]

It may, of course, be thought that the present is not a case where the covenants are strictly alternative, but that it is rather like Deverill v. Burnett, L. R. 8 C. P. 475. . .

[Discussion of Lowe v. Peers, 4 Burr. 2225.]

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This would appear to be an authority for the proposition that where one covenants to do A, and if he does not do A, then he will perform B; if the agreement to do A be illegal and void because wrong per se in the eye of the law, he cannot be compelled to perform B. But, if the agreement to perform A be not illegal in that sense, but simply unenforceable, such as a promise to marry a particular person, the promissor must perform B.

I have no doubt that the same rule will apply if A be illegal simply in the sense of being opposed to the practice of the Court. . . .

The same principle, I think, applies where A and B are really alternative, or where A is the primary promise and B the substitute. To take an extreme case, if A. promise B. to kill the king or pay B. $500. or if A. promise B. to kill the king, and if he does not kill the king, then to pay B. $500, in neither case can the promise to pay the $500 be enforced, and it was, perhaps, with some such thought that some of the American Courts have said that a promissor should not be compelled to carry out a void or illegal promise by such indirect means. This may have arisen from the loose way in which the words "illegal" and "void" are used, and furnishes one more example of the value of the maxim "Define your terms."

It must not be thought that the American decisions are unanimous upon any of the matters discussed in this judgment. I have not, however, thought it helpful to quote those which are in harmony with what I think is the law as laid down by the Courts in England—indeed, had the text-writers cited by the defendant been of less high authority, I should not have thought it necessary to consider at such length the cases cited by them.

I do not think that the authorities require us to hold that the agreement sued upon here is not enforceable, but rather the reverse.

If I am right, Knapp v. Carley, 3 O. W. R. 940, was rightly decided.

The appeal should be allowed, and judgment entered for plaintiff for $300 and interest from the teste of the writ. with costs here and below.

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BRITTON, J., gave written reasons for the same conclusion.

FALCONBRIDGE, C.J., agreed in the result.

JANUARY 16TH, 1907.

DIVISIONAL COURT.

CUMMINGS v. TOWN OF DUNDAS.

Highway—Roadbed Washed away by Natural Stream—Construction of New Roadbed—Diversion of Stream—Depreciation in Value of Property Abutting on Highway—Obligation of Municipality to Repair or Destruction of Highway—Duty to Repair where Cost Reasonable—Damages—Mandamus—Injunction.

Appeal by plaintiff from judgment of STREET, J., 6 O. W. R. 168, 10 O. L. R. 300, dismissing with costs an action brought by Maurice Cummings against the town corporation for damages, and a mandamus compelling defendants to repair Quay and Church streets, in the town of Dundas, and an injunction restraining them from obstructing the natural flow of a certain creek.

The claim for damages was made on the grounds that the streets in question had by defendants' negligence been allowed to fall into such disrepair as to deprive plaintiff of reasonable access to his property on Quay street; that defendants erected a dam on a certain creek and thereby caused the creek to be diverted from its natural channel to encroach upon and wash away part of Quay street, and to overflow upon and injure plaintiff's property.

E. D. Armour, K.C., and M. J. O'Reilly, Hamilton, for plaintiff.

J. W. Nesbitt, K.C., and H. C. Gwyn, Dundas, for defendants.

The judgment of the Court (MULOCK, C.J., TEETZEL, J. ANGLIN, J.), was delivered by

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MULOCK, C.J.: (after setting out the facts):—Plaintiff charges defendants as owners of one of the dams with having, by the erection of such dam, interfered with the natural flow of the water and caused the channel to be obstructed, whereby the water caused the injuries complained of, but there is no evidence to support this contention. It was not until after 4th September, 1897, that defendants acquired the dam, whilst the obstructions to the channel had taken place prior to that date. They are not, therefore, liable for the injury done to plaintiff's property, nor for the condition of Quay street, unless it be that of non-repair and not destruction. . . .

There are a number of cases wherein damage to the highway has been held to amount to destruction. . . .

[Reference to Regina v. Bamber, 5 Q. B. 279; Regina v. Hornsee, 1 Dears. C. C. 301; Rex v. Inhabitants of Landolph, 1 M. & Rob. 393; Regina v. Inhabitants of Paul, 2 M. & Rob. 307; McCormack v. Township of Pelee, 20 O. R. 288; The Queen v. Inhabitants of Greenhow, 1 Q. B. D. 703; Foster v. Wright, 4 C. P. D. 446; In re Hull and Selby R. W. Co., 5 M. & W. 333.]

Such physical injury to a highway as deprives its former owner of any title to it and of the right to repair it, whether the injury be called destructive or not, must necessarily relieve such owner of the obligation to repair, but when, as in The Queen v. Inhabitants of Greenhow, supra, the question is free from the element of change of ownership, then it becomes a question of fact whether the injury does or does not amount to destruction.

The injury to the highway in the present case is, I think, clearly distinguished from cases of destruction by the action of the sea. Here the first causes of injury were the construction and breaking away of the dam and the check to the outflow caused by the erection of the bridge, whereby the natural channel became partly filled, when contributions of silt brought down by freshets completed the filling up. Thus the creek, largely by artificial means, was compelled to seek an entirely new channel, and in such case the owner of the soil of the new channel does not lose his ownership, otherwise riparian owners, by diverting a river into a new channel, might, without his consent, deprive a person of his property.

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Further, it may be observed that when a river, from natural causes, takes a new channel, the owner of the soil in the new channel retains his ownership: Mayor of Carlisle v. Graham, L. R. 4 Ex. 373. . . . .

[Reference to Coulson & Forbes's Law of Waters, 2nd ed., p. 69; Foster v. Wright, supra; Lord Hale, De Jure Maris, pp. 6, 371.]

Notwithstanding the encroachments of the water on Quay street, the ownership of the portion thereof occupied by water still remained in defendants, and the present is clearly distinguishable from those cases above referred to where the encroachments by the sea were such as to deprive the former owner of his title to the lands encroached upon.

After this appeal was argued, the Court asked for the report of an engineer shewing the probable cost of constructing a substantial and permanent roadway of reasonable width and height above flood water. . . . Mr. Armour, C.E., gives it as his opinion that if the check to the flow of the creek caused by the Hamilton and Dundas Railway were removed, a roadway 30 feet wide could be provided at a cost of $150, otherwise it would cost about $800 to provide "a permanent and satisfactory width."

It being a question of fact whether there has been such destruction that restoration cannot be regarded as work of repair, the cost of restoration is an important circumstance in the determination of that question.

It is impossible to define the extent of damage necessary in order to take the case out of the non-repair class. In each case it must be one of degree, and it seems to me that if the damage can be effectually repaired at a cost reasonably within the means of the municipality, and if the expenditure seems justified by the public benefit to accrue from it, the case may properly be regarded as one of non-repair, and the municipality are not relieved from liability.

Consideration of the mere physical damage to a road cannot alone determine whether it amounts to destruction.

Numerous instances occur throughout the province of waters bursting their boundaries, crossing improved highways, washing away not only all traces of improvement, but also large quantities of the material forming the natural bed of the highway, and leaving impassable gullies. Physically regarded, the construction of the highway has been

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complete, but it could hardly be contended, I think, that in such case the legislature intended that sec. 606 should receive the narrow construction that the public were not entitled to look to the municipality to repair such damaged highway.

If this were the scope of the action, then communities seriously inconvenienced by such breaks in travelled roads would often be unable to carry on many of their ordinary affairs of life. The legislature, which has at all times endeavoured to supply the public with effective municipal machinery, did not, I think, intend that in respect of injury to a highway the municipality should be exempt from liability to rejair, if the highway could be effectually repaired at a reasonable cost, and one bearing a reasonable proportion to the benefit to accrue. . . .

[Reference to Caster v. Uxbridge, 39 U. C. R. 113; Plant v. Township of Normanby, 10 O. L. R. 16, 6 O. W. R. 31.]

In the present case the damage to Quay street may be permanently and sufficiently repaired at an outlay of $800. This does not appear an unreasonable burden to cast upon the ratepayers of the important town of Dundas. The expenditure will supply a safe and convenient highway for the general public, and be of special advantage to plaintiff in respect of his property on Quay street, now rendered almost valueless by the condition of non-repair of the highway. It may also be possible for defendants to accomplish the same end for $150.

I therefore think that in considering the question of fact whether the condition of the highway is that of non-repair or amounts to such complete destruction of the highway as would relieve defendants of liability to restore, the proper inference to draw is that it is a state of non-repair, and that defendants are liable to plaintiff in respect of the special damage sustained by him as owner of the property in question, and therefore, with great respect, I am not able to agree with the view of the trial Judge that it is a case of destruction for which defendants would not be liable.

Plaintiff is entitled to damages for a period commencing only 3 months before the issue of the writ, and we award him $25 damages up to the present time. He also claims damages by reason of the Church street bridge being out of repair. The evidence does not shew that he suffered any

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special damage. Further, the bridge was repaired within a reasonable time. That claim, therefore, should be dismissed.

Plaintiff asks that defendants be ordered by mandamus to repair. He is not, I think, entitled to such relief. A person suffering special damage because of non-repair of a highway has his remedy in damages. If he suffers only as one of the general public, then he has his remedy by indictment. Thus he has a specific remedy, and in such case the Court will not grant the extraordinary remedy of mandamus: King v. Bank of England, 2 Doug. 526. Further, a mandatory order, from its very nature requiring the performance of a specific duty, is inapplicable in the case of a general duty to repair: Hislop v. Township of McGillivray, 12 O. R. 749, 15 A. R. 687; Hubert v. Township of Yarmouth, 18 O. R. 458; Attorney-General v. Staffordshire, [1905] 1 Ch. 336.

Plaintiff also asks for an injunction restraining defendants from interfering with the course of the water. The evidence fails to shew such interference, and he is therefore not entitled to an injunction.

He should be paid his costs of action on the High Court scale and the costs of this appeal.

MABEE, J. JANUARY 17TH, 1906.

WEEKLY COURT.

WILLIAMS v. CORNWALL PAPER CO.

Building Contract—Extras—Absence of Written Order—Want of Authority—Pleading—Counterclaim—Costs.

Appeal by plaintiff and cross-appeal by defendants from report of Master at Cornwall upon a reference to him made by BRITTON, J.

D. B. Maclennan, K.C., for plaintiff.

W. Nesbitt, K.C., and R. A. Pringle, Cornwall, for defendants.

MABEE, J.:—The 7th ground of appeal is with reference to an item of $1,059.07, made up of 8 smaller items, sums

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claimed by plaintiff for extras upon the erection of a building for defendants.

The contract provided that no allowance for extra work or materials or rebates should be made, unless they were agreed upon by the building committee prior to the execution of the work, and a written order given for the work by the general manager, S. Greenwood. This was not done, and the items were disallowed by the Master. The cases quoted by him fully justify such disallowance, but counsel for plaintiff contended that defendants had not pleaded this defence, and therefore the same was not open to them.

There was a written contract between the parties, but plaintiff's claim is not based upon such contract; he claims simply for work done and materials furnished. Defendants set up this contract, and paragraph 7 of the statement of defence alleges that under the terms of this contract, and the specifications incorporated therein, plaintiff is not entitled to receive payment from defendants, because he has not complied with the terms of the contract, and has not been duly authorized as required by the contract and specifications to do the extra work which he claims for.

I think this is clearly pleading the want of authority provided for by the contract, namely, having the written authority of Greenwood and the agreement by the building committee, and that this defence was open to defendants.

Ground number 7 fails.

Number 19: $161.71 is made up of three items, viz., $13, $46.88, and $101.83, appearing in item number 2 of defendants' particulars, and allowed against plaintiff. These are now objected to, not upon the ground that the evidence does not shew that they were properly charged, but that they are not covered by defendants' counterclaim. I think it is now too late to take this objection; particulars were furnished, evidence given, and, although they are not covered by the counterclaim, they were fully dealt with, and it seems that an entirely just disposition of them was made by the Master.

This ground of appeal fails.

Number 18: $400 for rock excavation. The contract related only to earth excavation; rock was struck, excavated, and used by plaintiff in the foundation walls. I think plaintiff is entitled, as a matter not covered by the contract, to payment upon the basis of a quantum meruit for rock ex-

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cavation, but the difficulty upon this appeal is that the Master has found that plaintiff never intended advancing this claim until payment for other extras were refused by defendants; that during the progress of the work plaintiff kept no record of the quantity of rock removed; that plaintiff received the benefit of this rock by using it for foundation purposes; and that there was no evidence upon which the Master could estimate compensation. I am asked to say that he was wrong. If the matter were before me in the first instance, I might have arrived at a different conclusion as to the item, but I am unable to say, from the portions of evidence to which I am referred, that the result arrived at by the Master was not warranted by the evidence, or rather as he regarded it, by the lack of evidence. This ground fails.

This disposes of the grounds of appeal urged by plaintiff, and in disposing of them as I have I am not overlooking the argument that these items, or some of them, were charged up in defendants' books as cost of construction, but unless defendants are otherwise liable I do not think such charging up would have the result contended for. I regard this as a memorandum of the items filed with them upon construction account, and the fact of their being in the ledger could not have the effect of preventing their proper adjustment when the time came to pay.

Then as to defendants' cross-appeal. They allege that they are entitled to a deduction of $95.80 from $188.40 on item number 35. I do not think so. The Master has given his reasons in full for allowing the $188.40, and I agree with him. Items 17 and 18, $33.60 and $14.10 and the same may be said of item 6 for extra masonry owing to uneven ground—I think have been properly disposed of and call for no interference.

Defendants appeal against the disposition of the costs by the Master.

Plaintiffs claimed $2,979.72. Defendants paid $1,300 into Court. The case was by consent referred to the Master for trial, with power to dispose of all questions, including costs, with leave to enter judgment upon his report, after it became absolute. Ordinarily, unless by consent, the Master could not dispose of the costs. He has found $664.26 due plaintiff and allowed him costs down to the payment in of

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the $1,300, which was done under a special order, which provided that such payment in should not affect plaintiff's right to costs down to that date; he has allowed no costs to either side subsequent to payment in. I am asked to interfere with his discretion in so disposing of the costs of the long and expensive litigation. He had all the material before him to enable him to exercise a discretion upon this matter. I cannot say he was wrong; on the contrary, from what I have learned of the case from a careful argument of both appeals and a perusal of at least some of the 546 pages of evidence heard by the Master, I think he was right.

Probably the better view is that the parties having agreed to confer upon the Master a power he would not otherwise have had, namely, to dispose of the costs, there is no appeal from his disposition of them.

Both appeal and cross-appeal will be dismissed, and, instead of setting off, there will be no costs of either appeal.

CARTWRIGHT, MASTER. JANUARY 18TH, 1907.

CHAMBERS.

SCHLUND v. FOSTER.

Security for Costs — Plaintiff Ordinarily Resident out of Ontario—Evidence—Rule 1198 (b)—Amount of Security—Increase.

Motion by defendant for security for costs under Rule 1198 (b).

C. W.Kerr, for defendant.

J. C. McEwan (W. Laidlaw), for plaintiff.

THE MASTER:—The motion is supported by Mr. Kerr's affidavit exhibiting the writ and statement of claim. They were filed on 22nd December, though the writ was not served until 7th January instant.

In the statement of claim plaintiff is described as "a citizen of the United States, at present residing in the city of Toronto."

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Mr. Kerr's affidavit states that his partner informs him that he was last year told by plaintiff that he then resided at Chicago; that he has frequently registered at the King Edward Hotel (Toronto) as of Chicago; and that on 3rd January instant he again did so, even after this action had begun. No affidavit was filed in answer. Plaintiff asked that the motion should be dismissed on the authority of Hollingsworth v. Hollingsworth, 10 P. R. 50. But that case seems to be in favour of the motion, as will be seen on looking at Mr. Marsh's argument. The present affidavit is made sufficient by Rule 518. I offered to adjourn the motion if plaintiff wished to make an affidavit in answer, but this was declined.

Under these circumstances, and in view of Barry v. Oshawa Canning Co., 3 O. W. R. 190, and cases there cited, I think the order must go. The defendant asked for $1,000, but, under the judgment in Standard Trading Co. v. Seybold, 6 O. L. R. 379, 2 O. W. R. 878, I think that the usual amount will be sufficient at present, as it can always be increased when justice requires it to be done.

The costs of this motion will be in the cause.

MABEE, J. JANUARY 18TH, 1907.

WEEKLY COURT.

RE CAMPBELL AND CITY OF STRATFORD.

Municipal Corporations—By-law Regulating Eating Houses —Hours of Closing—Sunday Closing—Restraint of Trade—Municipal Act—Regulations—Powers of Council —Intra Vires.

Motion for an order quashing secs. 2 and 3 of by-law No. 1294 passed by the council of the city of Stratford on 1st October, 1906.

W. E. Middleton, for applicant.

R. S. Robertson, Stratford, for the city corporation.

MABEE, J.:—By the Consolidated Municipal Act, R. S. O. ch. 223, sec. 583, sub-sec. 34, power is given to pass by-

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laws for regulating eating houses, and by sub-sec. 35 for licensing the same. Sections 350 to 357 of the consolidated by-laws of the city of Stratford make provision for certain regulations applicable to and license fee payable by persons in charge of eating houses, and the council, deeming these insufficient, passed the by-law now complained of. The sections attacked provide as follows:—

"2. No such eating house shall be open, nor shall anything be sold therein, between the hours of 1 o'clock a.m. and 6 o'clock a.m., nor shall any person be supplied with eatables or refreshments therein within such hours.

"3. On Sundays no such eating house shall be open, nor shall anything be sold therein, nor shall any person be supplied with eatables or refreshment, after the hour of 7 o'clock in the evening."

The grounds taken in the notice of motion are that this by-law is in restraint of trade and therefore ultra vires, and that the council cannot prohibit a lawful trade being carried on in a lawful manner.

Many affidavits are filed shewing, in the opinion of the different deponents, why this eating house should not be required to close as provided by this by-law, but I think the answer to all this is that the municipal council has been authorized by the legislature to exercise its judgment upon matters of this kind, and that the Court cannot interfere so long as the council has kept within the authority conferred upon it, unless the restriction is clearly unreasonable and oppressive.

Then does what this by-law provides for fall within the powers of the council? It is authorized to regulate. Is a direction to close between 1 a.m. and 6 a.m. and at 7 p.m. on Sundays a regulation of these eating houses?

Among other meanings given by Worcester, "to regulate" is said "to subject to a prescribed course."

The Century says a regulation is "a rule or order prescribing the actions of those under its control;" "a rule prescribed by a municipality for the conduct of third persons dealings with it."

I think it is clear that the directions to close at stated hours are regulations, and fall within the express provision of the statute.

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It was contended that the case was covered by Regina v. Levy, 30 O. R. 403, but I think that case is clearly distinguishable. . . .

[Reference to Krun v. Tolman, [1896] 2 Q. B. 99; Regina v. Martin, 21 A. R. 145; Merritt v. City of Toronto, 22 A. R. 205; Barbier v. Connolly, 113 U. S. R. 27; Soon Hing v. Crowley, ib. 703; Calder v. Pilling, 14 M. & W. 75; Scott v. Pilliner, [1904] 2 K. B. 855.

The rule is that where power is given to license and regulate, proper provisions may be made as to the mode of carrying on the particular business; and if the Court interfered in the present case it would bring under review almost every act of municipal councils where attempts are made to regulate the many matters over which they are invested with supervisory power by the statute.

I think the application fails and must be dismissed with costs.

JANUARY 18TH, 1907.

DIVISIONAL COURT.

STOVER v. LAVOIA.

Water and Watercourses — Lands Bordering on Navigable Lake—Rights of Riparian Owner — Access over Shoal Water to Deeper Water—Removal of Sand or Gravel from Bed of Lake at Edge of Water—Trespass—Diminution of Soil—Recession of Shore Line—Special Injury—Injunction—Damages.

Appeal by defendant from judgment of BOYD, C., 8 O. W. R. 398, in favour of plaintiff in an action for trespass.

E. Meek, for defendant.

A. St. G. Ellis, Windsor, for plaintiff.

THE COURT (MULOCK, C.J., TEETZEL, J., ANGLIN, J.), dismissed the appeal with costs.

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JANUARY 18TH, 1907.

DIVISIONAL COURT.

ARMSTRONG v. SHERLOCK.

Landlord and Tenant — Distress for Rent — Suspension of Remedy—Promissory Note — Rent of Chattels—Abatement of Claim — Illegal Distress — Excessive Distress — — Detention of Chattels — Damages— Counterclaim.

Appeal by plaintiff from judgment of FALCONBRIDGE, C.J., 8 O. W. R. 577, dismissing an action for illegal and excessive distress and detention of goods, and granting defendant judgment on his counterclaim for $182 for rent, etc.

W. B. Raymond and C. Kingstone, St. Catharines, for plaintiff.

H. H. Collier, K.C., for defendant.

THE COURT (MULOCK, C.J., TEETZEL, J., ANGLIN, J.), dismissed the appeal with costs, but, upon consent of defendant, reduced the amount of the judgment on the counterclaim to $168.

JANUARY 18TH, 1907.

DIVISIONAL COURT.

CANADIAN OIL FIELDS CO. v. TOWN OF OIL SPRINGS.

Assessment and Taxes — Mineral Lands — Principle of Assessment—Buildings and Plant—Assessment Act, 1904—Valuation—Clerical Error—Costs—Jurisdiction of High Court in Action to Declare Assessment Illegal—Tribunal Provided by Assessment Act.

Appeal by plaintiffs from judgment of BOYD, C., 8 O. W. R. 480, dismissing (except as to one claim) an action for a declaration that a certain assessment made by defendants

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upon plaintiffs was illegal, and for an injunction restraining defendants from enforcing it. BOYD, C., held that certain mining plant upon plaintiffs' lands might be included under the term "buildings," and be taken into consideration by the assessor in fixing the assessable value of the buildings.

The appeal was heard by MULOCK, C.J., TEETZEL, J., ANGLIN, J.

A. Weir, Sarnia, for plaintiffs.

R. I. Towers, Sarnia, for defendants.

MULOCK, C.J.:—The question arises under the provisions of sec. 36 of the Assessment Act, 4 Edw. VII. ch. 23, which is as follows:—"(1) Except in the case of mineral lands hereinafter provided for, real property shall be assessed at its actual value. (2) In assessing land having any buildings thereon, the value of the land and buildings shall be ascertained separately, and shall be set down separately in columns 13 and 14 of the assessment roll, and the assessment shall be the sum of such values. The value of the buildings shall be the amount by which the value of the land is thereby increased." (3) In estimating the value of mineral lands, such lands and the buildings thereon shall be valued and estimated at the value of other lands in the neighbourhood for agricultural purposes, but the income derived from any mine or mineral work shall be subject to taxation in the same manner as other incomes under this Act."

The mining plant consisted of certain derricks, pipes, jerkers, triangles, and other appliances, not adding to the value of the lands for agricultural purposes, but used only in connection with the production of oil from the lands.

It was conceded in argument that the lands in question were "mineral lands" within the meaning of the Act.

In addition to this plant, there were certain buildings on the land, but the plant in respect of which this issue arises was not in nor did it form part of these buildings, but was distributed throughout the lands where oil wells were being operated.

The real question for determination is, whether, in these circumstances, this plant is assessable. . . .

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The assessor assessed the actual land at $25 an acre, being the estimated value of other lands in the neighbourhood for agricultural purposes. He also assessed the actual buildings at a certain other sum, and also assessed the mining plant, not as giving any value to the land for agricultural purposes, but as mining plant, at a certain other sum, and added this amount to the assessed value of the buildings, and set down the combined amounts as one sum, in column 14 of the assessment roll, as the assessed value of the buildings. . . .

In addition to contending that the plant is assessable, defendants point to the assessment roll and say that plaintiffs complain merely of over-assessment, and are merely seeking a reduction of the amount assessed against their buildings, and contend that the only tribunal competent to deal with such complaint is that provided by the Assessment Act.

I am unable to accede to that view. The method attacked seems to me a transparent attempt to evade the fair meaning of the Act. The question is not one of . . . assessable value, but whether the provisions of the Act can be defeated by the assessable value of property exempt from taxation being added to that of property liable to taxation. . . . The assessment of the exempted property was wholly illegal; that item of unassessable property is as clearly distinguishable from the assessable as if they were two separate properties . . . and it was not for the assessor . . . to assess it for taxation for any amount whatever. The illegality being beyond question established, the Court has jurisdiction to deal with it.

I therefore think this appeal should be allowed with costs.

There was an appeal from the Court of Revision to the County Court Judge, who gave judgment in respect of the assessment of the buildings, directing certain changes in the assessment roll. By a clerical error, the roll was not corrected, but the rectification was provided for in the judgment of the Chancellor, no costs being given in connection with that branch of the case. I do not think his disposition of these costs should be disturbed, but with that exception plaintiffs are entitled to their costs of this action.

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ANGLIN, J.:—I agree in the result. Sub-section 3 of sec. 36 of the Assessment Act does not explicitly exempt mining plant from assessment. But because the statute prescribes an exclusive standard of valuation, which can have no possible application to such plant, its owners necessarily receive the benefit of an exemption which it may not have been the intention of the legislature to confer. . . . The assessor exhausted his powers when he fixed as the value of plaintiffs' land "the value of other lands in the neighbourhood for agricultural purposes." When he added to that amount his valuation of something else, which could only be assessable as part of the land (sec. 2, sub-sec. 7), he not only increased the amount of the assessment of the land, but attempted to render subject to taxation something which the statute, in effect, if not in terms, exempts.

Although the Court of Revision is, subject to appeal, the appropriate, and in fact the only, forum in which the taxpayer can seek redress for an assessment excessive in amount, the owner of property not liable to taxation, but which has been illegally assessed, is entitled to ask this Court to relieve him of the burden thus improperly imposed.

TEETZEL, J., concurred.

JANUARY 18TH, 1907.

DIVISIONAL COURT.

STILL v. HASTINGS.

Malicious Prosecution — Want of Reasonable and Probable Cause—Functions of Judge and Jury—Nonsuit—Setting aside—New Trial—Questions for Jury—Judicature Act, sec. 112—Suggested Amendment.

Appeal by plaintiff from judgment of MABEE, J., at the trial, withdrawing the case from the jury, and dismissing the action.

The action was for malicious prosecution. The trial Judge, upon hearing the evidence offered on behalf of plain-

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tiff, held that there were no facts in dispute requiring determination by a jury, and that upon the undisputed facts plaintiff had failed to establish a want of reasonable and probable cause.

Plaintiff was a saw-miller, and defendant a lumber dealer. There was a negotiation between them for an exchange of lumber; certain lumber was said to have been taken by plaintiff from defendant's yard; and defendant prosecuted plaintiff for theft of the lumber. Plaintiff was acquitted and brought this action.

The appeal was heard by MULOCK, C.J., ANGLIN, J., CLUTE, J.

D. O'Connell, Peterborough, for plaintiff, contended that the real question between the parties was whether or not there was in fact an exchange of lumber, and this question should have been put to the jury, and the Judge should not, without putting this question and others, have ruled that want of reasonable and probable cause was not shewn.

R. McKay, for defendant, contra.

ANGLIN, J.:—This appeal raises once more the always difficult question of the respective functions of Judge and jury in determining whether or not the defendant, sued for malicious prosecution, had reasonable and probable cause for instituting criminal proceedings against plaintiff. . . .

Since Lister v. Perryman was decided in 1870, L. R. 4 H. L. 521, it has never been questioned that "the jury must find the facts on which the question of reasonable and probable cause depends, but that the Judge must then determine whether the facts found do constitute reasonable and probable cause." The difficulty generally experienced in the application of this rule, so easily stated, is in the determination of the question whether there are any facts in dispute upon which the jury should be asked to pass.

In determining that the plaintiff has failed to shew absence of reasonable and probable cause, and withdrawing the case entirely from the jury, the Judge must assume in favour of the plaintiff all facts of which he has adduced any reasonable evidence. It must in this case, therefore, be assumed that a quantity of oak lumber, which plaintiff was charged with having stolen, had, prior to the alleged theft,

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become his own property as a result of an exchange made with defendant.

It is perfectly clear that an absence of honest belief on the part of the prosecutor, in the guilt of the accused, negatives the existence of reasonable and probable cause. In the present case, assuming, as we must, that the exchange sworn to by plaintiff was actually made, belief of the defendant in the guilt of the plaintiff, when laying the information, necessarily implies his having forgotten that he had made such an exchange. Such forgetfulness is not admitted. It is somewhat improbable. It certainly cannot be assumed in defendant's favour. It is a question of fact for the jury, and, in these circumstances, the existence in the mind of defendant of an honest belief in plaintiff's guilt must, I think, also be deemed a question of fact upon which the jury must necessarily be asked to pass.

That this question is not always for the jury is made clear by the decision in Archibald v. McLaren, 21 S. C. R. 588. . .

[Reference to Young v. Nichol, 9 O. R. 347; Hicks v. Faulkner, 8 Q. B. D. 167, 171.]

Plaintiff admits that defendant, before laying information, charged him orally with the theft of the oak lumber in question, and that he made no answer to the charge—no allusion to the exchange. These facts did not, I think, warrant an assumption by the trial Judge that plaintiff's evidence as to the exchange was untrue, or his drawing an inference that, if any such exchange had in fact taken place, it had passed entirely from defendant's mind. The judgment indicates that he drew and acted upon both these conclusions upon questions which only the jury, I think with great respect, was competent to dispose of. Facts upon which the inference of reasonable and probable cause depends were, as I have indicated, clearly in dispute, and were necessarily subject to the findings of a jury.

The appeal must, therefore, be allowed, and a new trial directed. Costs of the appeal and of the former trial should be to plaintiff in any event.

I desire again to direct attention to the provisions of sec. 112 of the Judicature Act:—"Upon a trial by jury, in any case except an action of libel, slander, criminal conversation, seduction, malicious arrest, malicious prosecution, or false

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imprisonment, the Judge, instead of directing the jury to give either a general or a special verdict, may direct the jury to answer any questions of fact stated to them by the Judge for the purpose." I read this section as tantamount to an express prohibition against the putting of questions to a jury in actions of the classes enumerated. Notwithstanding its provisions, however, appellate Courts have affirmed the propriety of submitting questions to the jury in actions for malicious prosecution, and in reviewing cases in which questions have been put they have expressed no disapproval of that course: see Archibald v. McLaren, 21 S. C. R. 588, 592; Malcolm v. Perth Fire Ins. Co., 29 O. R. 406; Young v. Nichol, 9 O. R. 347; Hamilton v. Cousineau, 19 A. R. 203.

Every trial Judge who has dealt with actions for malicious prosecution must have realized to what embarrassment inability to put questions to the jury in such cases gives rise. It is often practically impossible to direct a jury hypothetically as to the facts upon which reasonable and probable cause depends in such a manner that there can be any certainty that the jury at all appreciates the nature and the scope of its duties in regard to the matters involved in this issue, or any assurance that, in pronouncing a general verdict, the jury will confine itself to the consideration of matters legitimately the subject of its findings. I would, therefore, suggest the advisability of eliminating from the exceptions in sec. 112 of the Judicature Act actions for malicious prosecution.

CLUTE, J., wrote a lengthy opinion, in the course of which he referred, in addition to the cases cited by ANGLIN, J., to Abrath v. North Eastern R. W. Co., 11 Q. B. D. 440, 14 App. Cas. 247; Panton v. Williams, 2 Q. B. 169, 192; Mitchell v. Williams, 11 M. & W. 205; Broad v. Ham, 5 Bing. N. C. 722, 725; Brown v. Hawkes, [1891] 2 Q. B. 718; Turner v. Ambler, 10 Q. B. 252; Taylor v. Williams, 2 B. & Ad. 857; Burley v. Bethune, 5 Taunt. 583; Heath v. Heape, 26 L. J. M. C. 49; Mitchell v. Jenkins, 5 B. & Ad. 588; and reached the same conclusion as ANGLIN, J.

MULOCK, C.J., concurred.

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MAGEE, J. JANUARY 14TH, 1907.

WEEKLY COURT.

EVANS v. JAFFRAY.

Partnership—Account — Payment by Partner — Credit for— Consideration—Services in Introducing Partner to Capitalists — Voluntary Payment — Reasonable Amount to be Allowed—Reference—Appeal—Costs.

Appeal by defendant Jaffray and cross-appeal by plaintiff from report of Master at Sandwich.

The action as against defendant Jaffray was for an account of the partnership dealings between plaintiff and defendant Jaffray and for damages for breach of contract.

The action was dismissed by the trial Judge (2 O. W. R. 678), but upon appeal the Court of Appeal (3 O. W. R. 877) declared plaintiff entitled to share in a sum of $20,000 received by defendant Jaffray, and to an account thereof, and directed a reference to the Master at Sandwich, whose report formed the subject of these appeals.

R. McKay, for defendant Jaffray.

W. M. Douglas, K.C., for plaintiff.

MAGEE, J.:—At the conclusion of the argument, plaintiff's appeal from the Master's report was dismissed except as to the one item of $5,000 paid by defendant to J. T. Johnston, and plaintiff's cross-appeal for interest on the balance found due to him by the Master was allowed. I have since read the portions of the evidence referred to by counsel as to the $5,000 item. The agreement between Evans and Jaffray and the general facts of the case are set out in the judgment at the trial (2 O. W. R. 678) and on the appeal therefrom (3 O. W. R. 877.)

It appears from the evidence that on the afternoon of 11th April, 1899, after the meeting of Evans and Jaffray at Toronto with the manufacturers whom they hoped to induce to join the consolidation enterprise they were endeavouring to form, had resulted in nothing, Jaffray went to see Johnston. He went, he says, because he wanted to

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be placed in touch with capital, so as to put the deal through, and so that the option which had been obtained should not become useless. He says he did not go to him as a capitalist. It does not appear that Johnston was engaged in business as a financial agent or promoter. Jaffray had appearently been on friendly terms with him, and had on that morning told him about the expected meeting in the afternoon. After it proved abortive, he went to Johnston's office, told him it was over and he had failed in the project and did not know what to do, and would have to go home to Chicago, and asked him if he could find anybody to carry the deal through. Thereupon Johnston said he would telephone Mr. Ryckman, and did so; and Ryckman came to Johnston's office. It appears that Ryckman had previously been talking with Johnston about Jaffray's plans. Nothing had been said between Jaffray and Johnston about remuneration to the latter. Apparently, however, Johnston had an eye to it, for he says he met Mr. Ryckman in the outer office and told him there was a good thing to put in his way, in which there was a lot of money, and got his promise, he says, for dividing up, and then took him into his inner office and introduced him to Jaffray. The project was discussed by the 3, and they arranged to meet that evening with Evans present. The 4 did meet, and the matter was further discussed. Mr. Ryckman took it in hand thenceforward, and submitted it to defendants Cox, Soper, and others, and succeeded in interesting them in it—he acting on their behalf and not on behalf of Jaffray and Evans. The result was an agreement in April by Cox, Soper, and others, to pay Jaffray $50,000 for his option and services in certain events, which apparently did not all occur. Ultimately they settled with him for $20,000, which was paid him on 2nd October, 1899. On 7th October, 1899, Jaffray gave to Johnston in settlement for his services $1,000 in cash and shares to the amount of $4,000 in common stock of another joint stock company.

Jaffray now seeks to have credit in respect thereof for $5,000 in his account with his partner, the plaintiff. . . .

Beyond the original introduction of Jaffray to Ryckman, Johnston does not seem to have had any practical part in the transaction. . . . Jaffray himself says that beyond the original introduction Johnston did no work, and again he says he paid him for the introduction and for that only, and, though he also says he expected Johnston to keep him

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posted, he admits being told that the latter could not give him information, though in what connection does not appear. Throughout the whole transaction Jaffray did not intimate the position to his partner Evans, though he told Evans, before bringing him to the meeting on the evening of 11th April, that he had seen Johnston, who had introduced him to Ryckman, and they were to meet Evans. Not long after that meeting, Jaffray seems to have come to the conclusion to ignore Evans's interest in the transaction, and the sums of $50,000 and $20,000 were fixed by Jaffray without consulting Evans and without his knowledge.

It would seem to have been reasonable that Johnston should receive something for his intervention. . . .

I find that the circumstances of Jaffray's interview with Johnston did not raise any implied promise to pay the latter, as might be the case with one whose ordinary business it was to attend to such matters. I also find that there was no actual promise till after 11th April, but that, though the benefit of the introduction had been already obtained, it was not only reasonable but prudent for Jaffray to agree to pay something, with a view not only to the service already rendered, but also the advantage and importance of having a friend in touch with those with whom he was dealing, and the possible disadvantage of having a dissatisfied person there. . . . The situation at the time of the promise implied, I think, the continued good offices, slight though they might be, of Johnston in carrying through the transaction, and formed a good consideration for the promise to pay for all. In one sense, too, his promise to pay Johnston might be looked on as a part of his dealing with Ryckman and his clients, as they were throwing the burden of paying Johnston upon him.

The fact that the whole transaction with Johnston was kept from Evans makes, I think, no difference, as it was actually for the purpose of the business, which, instead of being the sole property of Jaffray, turned out to belong to both. The same objection might be urged as to any of the expenses properly incurred. . . .

Then for what amount should Jaffray have credit? As there was no legal libaility for any particular sum, and as his partner was not consulted, the latter should not be held responsible for whatever the generosity of Jaffray, under the mistaken view of sole possession, chose to give to his friend

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Johnston. A reasonable sum only should be allowed, and any sum paid in excess of that should be borne by Mr. Jaffray himself. The shares which he gave are called common stock of the company, which would seem to imply that there is preferred stock. I assume they were paid up shares. Johnston says he received $5,000, or its equivalent. The shares . . . had no known quoted market value. . . To allow Jaffray credit for $4,000 for these shares would be to enable him to sell his own property to the firm, without the knowledge or consent of his partner, at his own price, regardless of its cost or value.

If both parties consent that these shares be considered to have been actually of not less value than $1,000, and that $2,000 would be a reasonable amount for Evans and Jaffray to have paid Johnston, assuming that he was legally entitled to be paid by them, a reference back to the Master may be avoided, and defendant Jaffray will be declared entitled to credit as against the firm and as of 7th October, 1899, for $2,000 in addition to what the Master has already credited him with. Such consent of the parties need not prejudice plaintiff in case of appeal by either party as to the legal liability of plaintiff to contribute anything. Failing such consent, there will be a reference back to the Master with instructions to fix a reasonable sum to have been paid to Johnston on behalf of the firm in pursuance of Jaffray's promise, anl to inquire as to what was the actual cash value of his interest in the shares at the time they were accepted by Johnston in settlement, and to give defendant Jaffray credit against the firm for the $1,000 cash paid Johnston and for such actual cash value—the whole credit not to exceed such sum as the Master may find to have been reasonable to have been paid.

There will be no costs of defendant Jaffray's appeal. Plaintiff will get his costs of the cross-appeal.

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THE

ONTARIO WEEKLY REPORTER

(TO AND INCLUDING JANUARY 26TH, 1907).

VOL. IX. TORONTO, JANUARY 31, 1907. NO. 3

CARTWRIGHT, MASTER. JANUARY 21ST, 1907.

CHAMBERS.

COPELAND-CHATTERSON CO. v. LYMAN BROTHERS.

Particulars—Statement of Defence—Action for Breach of Contract—Patent for Invention—Infringement—Affidavit—Practice—Costs.

Motion by plaintiffs for particulars of the statement of defence.

C. M. Colquhoun, for plaintiffs.

G. H. Kilmer, for defendants.

THE MASTER:—The statement of claim alleges the ownership by plaintiffs of patent No. 65,638, and that defendants bought 7 of the ledger binders made under that patent, subject to conditions which defendants have violated. Plaintiffs claim an injunction against such violation and damages on account of profits.

This would seem to be the ordinary action for breach of contract. Defendants, however, seem to have taken it to be an action on the patent, though no infringement is charged, unless the allegation that defendants are using unauthorized sheets for their binders can be so construed.

The statement of defence denies any infringement, and alleges 13 distinct grounds on which defendants dispute the validity of plaintiffs' patent, and in the last paragraph they deny having made the alleged contract. If plaintiffs had moved against these 13 defences as embarrassing, de-

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fendants might not have been able to sustain them, unless plaintiffs are really proceeding against them as infringers. They seem, however, to have acquiesced in the relevancy of these defences. On 2nd January plaintiffs demanded particulars of the objections; then, without waiting to see if they were going to be given, on 7th January plaintiffs delivered a reply in which they demur to the objections and join issue on the statement of defence. Three days later they served notice of motion for the particulars as previously demanded. This is not supported by any affidavit as to the particulars being necessary for trial or for any other purpose. . . .

On the authority of Smith v. Boyd, 17 P. R. 463, and Bank of Toronto v. Insurance Co. of North America, 18 P. R. 27, it would be necessary to dismiss the motion with costs, unless this is a patent action, in which such particulars are to be given as of right. The objections are the same of which particulars have been given in the action of plaintiffs against the Business Systems Limited. If the defences are to stand, these particulars must be given sooner or later, and it would be useless expense to require another motion for that purpose.

In all the circumstances, it will probably be best for all parties to direct that the particulars asked for be furnished in a week. However, I am not satisfied that the motion is regular when made without any affidavit in support. No order as to costs.

CARTWRIGHT, MASTER. JANUARY 21ST, 1907.

CHAMBERS

RHUM v. PASTERNACK.

Lis Pendens — Registry of Certificate—Motion to Vacate — Judicature Act, sec. 98 (3)—Vendor and Purchaser—Claim against Purchaser to Share in Land.

Motion by defendant to vacate the registry of a certificate of lis pendens.

H. H. Shaver, for defendant.

N. G. Heyd, for plaintiff.

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THE MASTER:—The writ of summons was issued and served on 20th December last. By the indorsement plaintiff claims an account of partnership dealings between plaintiff and defendant, and a declaration that plaintiff is entitled to an equal share in certain lands in the city of Toronto, as being partnership property. . . . The present motion was made on 10th instant. . . .

Defendant on 7th November last agreed to buy the lands in question from one Watson, but the sale has not yet been carried out, and cannot be concluded unless the lis pendens is vacated. The price is $35,000, and a mortgage for $32,500 was to be given back. Defendant denies the partnership alleged. Plaintiff as positively affirms its existence.

It is conceded that no written agreement was entered into by the parties. The existence of some arrangement or understanding between the parties is sworn to by Morris Levy. There has been no cross-examination on any of the affidavits.

If the land had vested in defendant, the motion would fail. Here, however, the sale cannot be carried out so long as the lis pendens remains as a cloud on the title. This will also prevent the owner from making any sale, and compel him to bring an action against plaintiff to have the cloud removed.

On the argument what appeared to be reasonable offers were made by defendant. He was content to have the deed delivered to his solicitor in escrow so that plaintiff might bring a fresh action upon which a certificate of lis pendens could properly be registered. The solicitor was ready to give his personal undertaking that plaintiff would not deal with the land in the meantime. For some reason plaintiff's counsel would not accept this solution, and it therefore seems that the motion should be granted. Plaintiff here is trying to do something like what was unsuccessfully attempted in Green v. Temple, 6 O. W. R. 15. Such applications of the doctrine of lis pendens are not possible. If otherwise, in a time of activity in real estate, every owner who had entered into a contract to sell might find himself tied up by reason of an alleged agreement made between the purchaser and some other person of whom the owner had never heard.

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If plaintiff will now accept the terms offered by defendant, the better course would be to discontinue the present action and vacate the lis pendens, leaving the costs to abide the result of a new action after the sale has been carried out. If plaintiff declines to do this, the order will go vacating the lis pendens with costs to defendant in any event.

In this case it would seem just to apply the power given by sec. 98, sub-sec. 3, of the Judicature Act.

BRITTON, J. JANUARY 21ST, 1907.

TRIAL.

THOMPSON v. ONTARIO SEWER PIPE CO.

Master and Servant—Injury to Servant—Action for Damages—Workmen's Compensation Act—Limitation of Time—Waiver—Correspondence—Common Law Liability—Findings of Jury—Reasonable Precautions.

Action for damages for injuries sustained by plaintiff by the bursting of a steam valve in defendants' works at Mimico, where plaintiff was employed.

R. McKay, for plaintiff.

I. F. Hellmuth, K.C., for defendants.

BRITTON, J.:—Plaintiff asserts liability of defendants at common law, and under the Workmen's Compensation for Injuries Act.

At the trial the jury answered the following questions in favour of plaintiff:—

1. What occasioned the accident to plaintiff, from which he sustained injury on 9th November, 1904?" Ans. Bursting of the valve.

2. If it was the bursting by steam of a valve, what, in your opinion, led to or caused this bursting by steam? Ans. Strain on the valve.

3. Were defendants guilty of any negligence in what you find caused the bursting? Ans. Yes.

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4. If so, in what respect, what is the negligence you find? Ans. Allowing the engine to be run on an improper bed.

5. Did defendants supply proper appliances, and maintain these in a proper condition for the work to be done by plaintiff? Ans. No.

6. If not, in what respect were such appliances not in a proper condition? Ans. Engine in bad condition. Bed in bad condition. Room in bad condition.

7. If the injury to plaintiff was caused by the bursting of a valve, was that valve defective? Ans. No.

The accident happened on 9th November, 1904. This action was commenced on 20th January, 1906.

Defendants plead as a defence sec. 9 of the Workmen's Compensation for Injuries Act, which requires the action to be commenced within 6 months from the occurrence of the accident causing the injury.

Plaintiff replies that the time for bringing the action was extended, with the consent of defendants, in pursuance of an agreement in that behalf, whereby it was agreed that defendants should pay to plaintiff $10 a week until it was ascertained whether or not he would recover from his injuries, and if he did recover it was agreed that no writ should issue so long as the sum of $10 a week was paid. Defendants did pay $10 a week for 50 weeks, and then stopped.

As to the agreement; on 16th November, 1904, Mr. Johnston, acting for plaintiff and his wife, wrote to defendants asking if some settlement could not be made or some provision made for the immediate payment of some sum for the pressing needs of plaintiff and wife.

On 19th November defendants replied referring Mr. Johnston to an insurance company.

On 23rd November Mr. Johnston wrote asking defendants to name their solicitor to whom writ could be sent, and declining to have anything to do with an insurance company.

On the 28th defendants wrote to Mr. Johnston as follows: "Replying to your letter of the 23rd inst., we might say that from our present knowledge of what took place we are really in no way to blame for the unfortunate acci-

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dent, but will immediately look more fully into it, and report to you later on. Meanwhile, if Mrs. Thompson is in need of assistance, entirely without prejudice to our legal rights, we will as a matter of sympathy see whether some aid cannot be given her."

On the same day (28th November) Mr. Johnston wrote defendants: "Mrs. Thompson is really in need of assistance. I should like to get something for her in the meantime, and anything you pay will be entirely without prejudice to your legal rights. It would not be unreasonable to give the woman, say, $10 a week, until she sees what the outcome regarding her husband may be. If, later on, these people are unable to come to an arrangement with you, and have to sue, any sum that you pay now would be credited on any judgment which they might obtain against your company in the future. All this is, of course, entirely without prejudice to either side, and would not be alluded to in any way at the trial. I dare say it might tend materially to increase the chances of a compromise when Mr. Thompson is able to be up and to attend to the matter for himself." . . .

On 5th December defendants wrote to Mr. Johnston: "On making inquiries at the home of Mr. Luke Thompson, we find that his wife is really in need of assistance, and, although she will accept nothing from us in the way of charitable assistance, she admits that she would accept anything that came through you. We will therefore act along the line of your suggestion, and without prejudice to any legal liability in the matter pay her $10 a week until your claim is settled, and should you be awarded damages against us, although we are quite certain that we are in no way to blame, the amount paid will be credited at the termination of the trial for settlement. We are enclosing you cheque for $10 as our first remittance along this line."

On 6th December, 1904, Mr. Johnston wrote to defendants: "Dear Sirs: Received cheque $10 account Luke Thompson. This with all subsequent payments will be entirely without prejudice and on terms set out in my letter of late date." The letter referred to is the one of 28th November, 1904.

Defendants continued to pay until December, 1905, when payments amounted in the whole to $500.

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A settlement is set up in the statement of defence, and this is attacked. At the trial defendants said they were quite willing to waive it, and plaintiff's counsel consented, so nothing turns upon that. I find that there was not on the part of defendants any admission of liability or waiver of right on part of defendants to set up limitation of time as a bar to plaintiff's right to recover under the Act referred to.

Rendell v. Hills Dry Docks and Engineering Co., [1900] 2 Q. B. 245, seems authority against plaintiff.

Powell v. Main Colliery Co., [1900] A. C. 366, distinguishes between "the claim for compensation," and the request for arbitration under the English Act.

Oliver v. Nautilus Steamer Shipping Co., [1903] 2 Q. B. at p. 646, refers to and explains Rendell v. Hills Dry Docks and Engineering Co.

Our Act is imperative as to the commencement of the action. Under sec. 9, notice of injury must be given within 12 weeks, and the action must tbe commenced within 6 months (or 12 months in case of death.) Want of notice may be excused. Section 9 is subject to the provisions of secs. 13 and 14, but these sections in no way modify or extend time for commencement of action. I hold that defendants are not estopped from pleading the time limit as a bar.

As to defendants' liability at common law, the jury has found that defendants did not supply proper appliances and maintain these in a proper condition for the work to be done by plaintiff. They find that allowing this engine to be on an improper bed caused a strain on the valve which led to its bursting, and this caused the injury to plaintiff, and they find defendants guilty of negligence in this respect.

I have read the cases cited, and, in view of what I can not but regard as the somewhat changed opinion, and perhaps still unsettled opinion, as to how far the neglect of a defendant corporation to take all reasonable precautions for the servant's safety creates a liability at common law, I deem it my duty to enter judgment for plaintiff upon the findings of the jury declaring the liability of defendants and for the $4,000 damages assessed against them.

I refer particularly to the cases of McKelvey v. LeRoi Mining Co., 32 S. C. R. 664; Grant v. Acadia Coal Co., 32

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S. C. R. 427; Traplin v. Canada Woollen Mills, 35 S. C. R. 424; Mitchell v. Canada Foundry Co., 35 S. C. R. 452.

These cases will warrant me in this course, leaving it to the defendants to move on the branch of the case involving liability at common law, and plaintiff must move on the other branch should the case be carried further.

Judgment after 30 days for plaintiff for $4.000 with costs.

MABEE, J. JANUARY 22ND, 1907.

CHAMBERS.

RE BAKER AND KELLY.

Arbitration and Award—Motion to Enforce Award—Leave to Issue Execution—Jurisdiction of Local Judge—Discretion to Refuse Motion—Arbitration Act, sec. 13—Stay of Proceedings—Application to Set aside Award—Time.

Appeal by Kelly from an order of the local Judge at Chatham giving Baker leave to issue an execution to enforce an award made in his favour.

W. E. Middleton, for appellant.

C. J. Holman, K.C., for respondent.

MABEE, J.:—On 9th June, 1906, Baker and Kelly by a voluntary submission agreed to leave to named arbitrators "all their disputes and differences concerning the claims each of them has against the other arising out of the tenancy aforesaid." A recital in the bond states that differences had arisen between the parties relative to the northwest half of lot 1, concession 4, Harwich, of which Baker had been tenant of Kelly, and in respect of which Baker claimed from Kelly for certain services rendered in seeding, ploughing, harrowing, and preparing the ground for crop, and that he had an interest or share in the growing crop then on the land. Previous to the submission Baker's solicitor had demanded from Kelly, by letter of 9th May, the sum of $50, for 24 acres of fall wheat, and one day's

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ploughing. A third arbitrator or umpire was agreed upon, and on 23rd June an award was made, Archibald Cameron, the arbitrator named by the appellant, dissenting, in favour of Baker for $61.25, arrived at as follows:—

Kelly owes Baker,	for cleaning house	$10.00
	Cutting wheat	50.00
	Horse rent	15.00
	Half day cutting wood	.75
	Bal. sale of fodder	4.50
		$80.25
Baker owes Kelly,	Rent of stove	$ 5.00
	Keep of cows	14.00
		$19.00

and deducting the $19 from the $80.25, the balance was in Baker's favour for the $61.25. All costs were ordered to be paid by Kelly.

A motion was made upon behalf of Baker before the local Judge to enforce this award, and in an affidavit filed upon that motion it appears that the award, evidence, and papers were filed upon behalf of Baker with the local registrar at Chatham on 12th July, 1906, and a notice of filing served upon Kelly's solicitor on the same day.

Upon the return of the motion an affidavit made by Kelly was filed, in which, among other things, he states that neither party was represented by counsel before the arbitrators, and that the latter did not allow either party to be present when the other was giving his evidence; that Baker gave his evidence first, and that he had no knowledge that Baker had made any claim other than for the $50 mentioned in the letter; and that it was not until after the conclusion of the arbitration that he knew Baker was claiming for horse rent and other matters; and that then he for the first time learned that an account against him had been presented to the arbitrators by Baker for over $400. Archibald Cameron also made affidavit that he had read Kelly's affidavit, and that the above statements were true, and that he, as one of the arbitrators, knew nothing of any claim being in dispute save the one of $50, until Baker produced

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claims aggregating about $400, and that he then opposed going into any matters except those of which Kelly had notice, but that he was overruled. These facts were not controverted, and a clause in the order in appeal states that it is made "without taking into consideration the allegations and statements made in the said affidavits of Kelly and Cameron in regard to the merits of the arbitration or the proceedings before the arbitrators, which allegations and statements were not received, on the ground that it was not open to the said Kelly to rely thereupon in answer to this application."

The motion was made under sec. 13, R. S. O. 1897 ch. 62, which provides that "an award or submission may, by the leave of the Court or a Judge, be enforced in the same manner as a judgment or order to the same effect."

Re Lloyd and Pegg, 5 O. L. R. 389, 2 O. W. R. 103, is relied upon for the respondent, but I do not think that case at all like the present. . . . That case certainly is not an authority to the effect that the Court cannot withhold leave to enforce an award upon application for an order under sec. 13 of the Act. If the Court is not to exercise its discretion, there can be no object in requiring an application for an order to be made, and the execution could as well issue upon præcipe.

The section provides for the enforcement "by leave of the Court." This must mean, only where the Court deems it proper that it should be enforced, shall the order be made.

In Peuchen v. Laird, 25 C. P. 588, upon demurrer, it was held, in an action on an award, that facts forming ground for setting aside the award could not be pleaded. . .

I do not think Peuchen v. Laird an authority for saying that upon an application under sec. 13 the Court cannot receive affidavits such as those rejected here; it is not a question of holding the award good or bad, or setting it aside in whole or in part, but merely saying, in the face of these facts, that execution should not issue, for the present at least. The difficulty the appellant is in is that under the schedule to the Act the award is final and binding, and the time seems to have gone by for him to move to set it aside. He contended that it was bad upon its face as covering something not referred, viz., the horse rent. I think the submission covered everything relating to the tenancy, and I

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am not to assume that the arbitrators exceeded their powers. The appellant should have an opportunity to apply for leave under sec. 45 to extend the time for moving against the award; he set up grounds in his affidavit before the local Judge which may entitle him to obtain such leave, but as to this I express no opinion.

An order may be made staying proceedings for 30 days to enable the appellant to apply for such leave; if no application is made, or if such application is refused, this appeal will be dismissed with costs; if such leave is granted, the costs of this appeal and of the motion before the local Judge can be better dealt with when the validity or finality of the award is considered, and may be reserved for disposition at that time.

Objection was taken to the power of the local Judge to make the order in question, but I think he had jurisdiction.

JANUARY 22ND, 1907.

C.A.

NORTHERN ELEVATOR CO. v. LAKE HURON AND MANITOBA MILLING CO.

Contract — Correspondence — Sale of Wheat — Dispute as to Price—Terms of Contract—Evidence of Custom or Usage in Trade.

Appeal by plaintiffs from the judgment of FALCONBRIDGE, C.J., 7 O. W. R. 484.

The appeal was heard by MOSS, C.J.O., GARROW, MACLAREN, MEREDITH, JJ.A.

J. H. Moss and Featherston Aylesworth, for plaintiffs.

W. Proudfoot, K.C., and W. A. Skeans, for defendants.

GARROW, J.A.:—The action as originally framed was for the conversion of a cargo of wheat, but by amendment an alternative claim for goods sold and delivered was allowed to be set up. And to this defence is simply payment, a de-

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fence which it is conceded must prevail unless plaintiffs are entitled to add to the written contract a so-called custom or trade usage of the wheat market at Winnipeg, whereby it is said that upon such sale by a Winnipeg dealer of wheat there is an implied term which binds the buyer to sell a similar quantity of New York wheat to the original vendor.

The contract, apart from the alleged custom, was made by correspondence, which is set out in the judgment of the Chief Justice. The price was apparently to be based upon the price of New York wheat; and it appears in evidence that daily quotations of New York prices for July wheat are available at Winnipeg and other leading grain centres. The price was to be fixed on or before the date of shipment, and payment was to be made by a sight draft for $25,000, and weekly payments thereafter.

There is, therefore, nothing apparently lacking in the correspondence essential to the creation of a fully expressed agreement providing for the sale of the goods in question at a price to be fixed on or before the date of shipment, upon terms of payment expressly mentioned. The only thing at all open was the price, but that was apparently capable of exact definition by reference to the New York quotations, which prices were to rule.

And it is to this contract that plaintiffs propose to annex the custom in question.

At the trial counsel for defendants objected to the reception of the evidence as to the alleged custom, upon the ground that the whole contract between the parties is in writing, and the evidence was received subject to the objection.

In my opinion, the objection was well founded, and the evidence should not have been received.

The rule is, I think, well stated in Mollet v. Robinson, L. R. 5 C. P. 646, at p. 656, by Willes, J., thus: "It is also an elementary proposition that a custom of trade may control the mode of performance of a contract, but cannot change its intrinsic character. It may regulate as extrinsic what is done in the market where the contract does not provide otherwise. It cannot overrule what is agreed upon between the parties whether intrinsic or extrinsic." See also the same case in L. R. 7 C. P. 84, and L. R. 7 H. L. 802. And by Bramwell, B., in Allan v. Sundius, 1 H. & C.

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123, at p. 129: "A custom may be annexed to documents with which it is not inconsistent. . . . If inconsistent or incoherent with the agreement it cannot be annexed to it." The subject is also very fully discussed in Brown v. Byrne, 3 E. & B. 715, and Humphrey v. Dale, 7 E. & B. 274, and E. B. & E. 1004.

The alleged custom would, if established, clearly do more than merely add terms incidental to the performance of the written contract. It would in effect result in this, that what is stated as a sale is not in fact a sale at all but an exchange of May Winnipeg wheat for July New York wheat, and payment of the difference, if any. And this, among its other radical results, would render nugatory the explicit terms of payment contained in the written contract. For, if the vendee is to supply the New York wheat, it seems to follow that he ought not also to pay for the Winnipeg wheat.

The plaintiffs' contention resembles somewhat the contention put forward unsuccessfully in the case of Phillipps v. Briard, 1 H. & N. 21. There it was alleged that by the custom of London it was to be implied that upon a ship being chartered and consigned to the consignees' agent in China, it became the right and duty of such agents to procure a return charter or cargo, and to receive the usual commission for so doing, and the action was brought for damages because the defendants would not permit the agents to procure the return charter. A demurrer to the declaration was allowed, upon the ground, as expressed by Pollock, C.B., that what was sought was not to explain the contract by the custom or to add to it some incidental matter not inconsistent with what was expressed, but to impose upon the party who had entered into one contract, another and a different obligation.

That, I think, very well expresses the situation here, and, adopting it as I do, is in itself sufficient to dispose of this appeal adversely to plaintiffs.

And in expressing this as my conclusion I do not dissent from the opinion apparently held by the learned Chief Justice that the custom or usage was not proved even as applied to the Winnipeg market, in the case of sales such as the one in question. The custom is certainly an extraordinary one as applied to sales by a dealer to a

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miller for consumption in his mill, although perhaps less extraordinary between dealers in options, where, after all, all that is intended to pass from the one to the other is the difference in price between the present and the future wheat. And it would require to be established by evidence that left no doubt that the custom was well known and in practice universal in the market in question, a condition of things which, notwithstanding the evidence, may, I think, well be doubted.

Mr. Crowe, plaintiffs' manager, speaks of it as a common and recognized practice of dealing in the grain trade —"Universal may be a little strong, because there may be flat trades, but it is trading that is done very generally."

This is as far as he would go, and in his own letters and telegrams leading up to the contract he explicitly offers to make what is called a flat or fixed price for the wheat in question. Mr. Tilt, called by plaintiffs, speaks of it as a method of dealing "preferable especially to the New York buyers," and as a well known method of dealing in the grain trade, but he never sold to an Ontario miller on option. Mr. Stuart, also called by the plaintiffs, is a grain dealer residing at Montreal, not at Winnipeg, where Mr. Crowe and Mr. Tilt reside and carry on business, and throughout his evidence, as I understand it, is speaking not of a Winnipeg usage, but of the usage at Montreal in dealings in Manitoba wheat. He says the practice of selling at a price over or under New York prices is a common one well known in the trade, and is really an exchange. But he admits that the circumstances of sending an invoice, and of stipulating for payments, as was done in the present instance, are at least puzzling, in a transaction which he calls, and I think properly, if the custom is to be given effect to, an exchange.

That is really all the evidence offered by plaintiffs to prove the custom, and it is, as I have said before, quite insufficient, in my opinion, to establish it as against these defendants.

The appeal fails and should be dismissed with costs.

MEREDITH, J.A., agreed in the result, for reasons stated in writing.

MOSS, C.J.O., and MACLAREN, J.A., also concurred.

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JANUARY 22ND, 1907.

C.A.

MACOOMB v. TOWN OF WELLAND.

Highway—Dedication — User by Public — Action—Parties—Attorney-General — Municipal Corporation — Ownership —Title.

Appeal by plaintiffs from judgment of ANGLIN, J., 12 O. L. R. 362, 7 O. W. R. 876, dismissing the action.

The appeal was heard by MOSS, C.J.O., GARROW, MACLAREN, MEREDITH, JJ.A.

G. Lynch-Staunton, K.C., W. M. Douglas, K.C., and T. D. Cowper, Welland, for plaintiffs.

E. D. Armour, K.C., for defendants.

MOSS, C.J.O.:—Plaintiffs' claim is, as owners of certain parcels of land fronting upon the Welland river, for a declaration that no highway exists over those parcels of land, and that defendants have no right of way or interest in them and had no right to enter upon or exercise municipal control over them, and for an injunction restraining defendants from entering upon them.

A further claim made by plaintiff G. W. Wells for rectification of a conveyance of a portion of the lands executed by the defendants to one James McGlashan, was submitted to by defendants, and the only question on this branch is as to the effect, if any, of the rectified conveyance upon the relief now sought by plaintiffs against defendants.

By their statement of defence defendants admitted the allegations made in the statement of claim that the lands traversed by the alleged highway are owned in fee by and in the actual possession of plaintiffs, but they asserted the existence of a road or highway which they alleged had not been legally closed and conveyed to plaintiffs' predecessor in title, in manner and form as alleged by plaintiffs, but, on the contrary, defendants had since the year 1855 used the road as a public highway and caused statute labour to

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be done thereon, and by reason of such constant user and performance of statute labour had obtained the right to maintain the said road as a public highway.

Before trial defendants consented and agreed that production of a copy of a by-law of the township of Crowland closing the River road and production of a copy of deed from the township to Thomas Burgar would be admitted as sufficient evidence of the legal closing of the road and of title thereto in Thomas Burgar, plaintiffs' predecessor in title.

At the trial plaintiffs put in a copy of a by-law passed by the municipal corporation of the township of Crowland for closing the concession line across lot 24, between the 4th and 5th concessions of the township, and also the road known as the Welland River road, from the place where Burgar street intersects the said road west to the concession line between the 4th and 5th concessions, in lieu of Burgar street as shewn and laid down in a map referred to in the by-law, and for the conveyance to Thomas Burgar in fee of the said concession line and road as described in the by-law. This was done in consideration of Thomas Burgar opening for public travel the streets caled in the by-law Main and Burgar streets. And it was further enacted by the by-law that Thomas Burgar should have the right to close up the concession line and River road as soon as Main and Burgar streets were opened for public use and travel, and that the road allowance and River road should from and after the day Thomas Burgar should open for public travel Main and Burgar streets, given in lieu thereof, cease to be public roads or highways, and should be and remain forever closed up and the right of the public to travel thereon should cease and determine.

Plaintiffs also put in a copy of a registered memorial of a conveyance made 27th December, 1855, by and between the municipal council of the township of Crowland of the first part and Thomas Burgar of the second part, whereby, after reciting the by-law, the corporation of Crowland granted and conveyed to Thomas Burgar in fee the portions of the concession line and the River road as described in the deed and in the map of the premises referred to in the by-law.

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In 1856 the defendants were incorporated as the municipality of the town of Welland, with boundaries embracing the premises in question, but it is clear that at that time they acquired no title to the portion of the River road now in dispute. And, as put by the trial Judge at p. 363, "this land must for the purposes of this action be deemed to have become private property in 1885." And, as he further goes on to say, "if a highway now exists upon it, it must be by virtue of an express or implied dedication thereof by the owner for the purpose of a highway since that date."

Except a subsidiary question as to parties, which may be put aside for the present, there remained to be dealt with by the trial Judge only the question whether the facts shewn in evidence established a dedication of the lands as a public highway. The learned Judge determined the question in defendants' favour.

It goes almost without saying that the onus of shewing dedication was upon defendants: see Chinnock v. Hartley Wintney Rural District Council, 63 J. P. 327. The soil and freehold having been shewn to be vested in plaintiffs, it was incumbent on defendants to shew clearly and beyond any reasonable doubt that plaintiffs' ownership had become subject to a right in the public, the question being whether, as against plaintiffs, there was sufficient evidence of an intention on the part of the owners of the soil to dedicate the land to the public as a highway. Commencing, therefore, with the highway closed by by-law and the fee vested in plaintiffs' predecessors in title in 1855, the inquiry is by what means, if at all, has this land been again converted into a highway. Defendants rely on user and the performance of statute labour, or, what seems to have been considered equivalent to the latter, work done on the railway and paid for by defendants.

In considering the question, it is important to bear in mind that we are not left in uncertainty as to the intentions, in 1855, of the parties now represented by the plaintiffs and defendants respectively. It is clear that all parties then intended that the portion of the River road now in dispute should cease to be a highway, and that in lieu thereof the portion of Burgar's property now known as Burgar and Dorothy streets, should be erected into highways; and it is

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equally clear that Burgar and Dorothy streets are now highways in defendants' municipality. It is also to be borne in mind that, as found by the Judge, Burgar street was unfit for use as a public highway, and was not opened for traffic until 1873 or 1874. After it was opened it was used, but it appears not to have been in a very good condition for traffic, and the use of the old roadway was not discontinued entirely. Traffic was divided between it and Burgar street. But, in view of the circumstances of the locality at that time, not much weight ought to be attached to this fact. The roads were clay, and heavy and difficult for travel or traffic, particularly at some seasons of the year, and persons travelling upon them naturally sought the easiest way. It is reasonable to regard such user from the point of view to which expression was given by the late Chief Justice Spragge when Vice-Chancellor in Dunlop v. Township of York, 16 Gr. 216, at p. 222: "In a new country like Canada, it would never do to admit user by the public too readily as evidence of any intention to dedicate. Such user is very generally permissive and allowed in a neighbourly spirit by reason of access to market or from one part of a township to another being more easy than by the regular line or road. Such user may go on for a number of years with nothing further from the mind of the owner of the land or the minds of those using it as a line of road than that the rights of the owner should be thereby affected." Having regard to the terms of the by-law and the fact that Burgar street was not open for traffic until 1873 or 1874, the user of the River road by the public up to that time cannot be regarded as any evidence of intention to dedicate. And as to continuance of user thereafter there is nothing upon the evidence to indicate that it was permitted in pursuance of an intention formed by the owner to dedicate that which had been acquired for the purpose of putting it out of existence as a public highway. User originating as shewn in this case cannot be regarded as carrying as much weight, as evidence of intention, as user commenced and continued for a number of years with no qualified circumstances appearing. There appears to be no reason against applying to the former case considerations the converse of those applied by Lord Tenterden in Rex v. St. Benedict, 4 B. & Ald. 447, as explained by Blackburn, J., in The Queen v. Bradfield, L.R. 9 Q. B. 552, at p. 555, viz., that in the case of a road origin-

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ally set out as an occupation road the degree of user by the public should be more narrowly watched than in the case where the way had never been private. May it not be said in the case of a road originally public but closed by municipal by-law, with the intent of putting it out of existence as a public highway, that the subsequent user by the public should be more carefully scrutinized?

In 1871 the land was acquired by one A. J. McAlpine, who was a witness at the trial. He said that after he acquired it he allowed people to use the road, and he put a snake fence along the south side of the road to keep them from driving over from the road on the land. When he did this does not clearly appear, but apparently it was soon after he became the owner. He gave as his reason that he supposed it belonged to the public—and in this he was not far from correct, in a sense, for until 1873 or 1874, when Burgar street was opened, the public were entitled to use it. And this would account for the addition to the habendum in the conveyance from him of part of the land on which the fence was to A. Williams on 16th July, 1873, of the words "and to any right which the public may have in that portion of said lot now used as a highway across said lands." In a deed from McAlpine to James McGlashan of another part of the lands dated 9th July, 1884, similar words occur, probably following the terms of the earlier conveyance. At all events they should be regarded rather as due to misapprehension with regard to a supposed existing right than as a deliberate declaration of intention to dedicate. McAlpine's testimony does not lead to the impression that he would have acted as he did but for his mistaken belief that there was a public right. And it is clear that during his ownership the new public right now claimed was not irrevocably established. James McGlashan acquired the property now owned by plaintiff Wells by three purchases, the first in 1883 and the last in 1885. During the year 1884 he completed the erection of a dwelling house on the part purchased from A. Williams. Before he built the land was lying as a common not enclosed and open to the coming of any one who wished to go over it. McAlpine's snake fence had disappeared. The beaten track which had been made or preserved by the traffic that continued over it since Burgar street was opened was apparent on the ground, but in bad weather the track was not adhered to. People driv-

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ing sometimes went north and sometimes south of it seeking the driest and least muddy part of the ground.

The house was built fronting towards the river, and so close to the edge of the track farthest from the river as to evidence that McGlashan could not have supposed there was a highway upon the land over which the public would be at liberty to pass in close proximity to his doors and windows. Shortly after its completion there seemed to be some opposition to the site of the house being placed where it was as tending to interfere with the roadway, but no action was taken. And in 1886 McGlashan planted a hedge in front, which extended to and in some parts was upon the track, and a few feet outside of this he stretched a wire so as to protect the hedge, the effect being that persons driving across the land were compelled to keep nearer to the edge of the river than formerly. It was a distinct interference with the line of the roadway as formerly used. And this condition has remained undisturbed to the present. These facts as well as the evidence that from time to time McGlashan objected to, and in at least one or two instances prevented, workmen attempting to work with a scraper or construct a culvert, are inconsistent with intention to dedicate; and the actual interference with or part interruption of the travel upon a portion of the track go far to rebut any presumption arising from the user in the manner shewn.

In Poole v. Huskisson, 11 M. & W. 827, Parke, B., enunciated a principle since frequently quoted and acted upon. He said (p. 830): "In order to constitute a valid dedication to the public of a highway by the owner of the soil, it is clearly settled that there must be an intention to dedicate—there must be an animus dedicandi, of which the user by the public is evidence and no more; and a single act of interruption by the owner is of much more weight upon a question of intention than many acts of enjoyment." Reference may also be made to Chinnock v. Hartley Wintney Rural District Council (supra), a case resembling the present case in several respects. It is true the interpretation in this case did not extend to the whole roadway, but it was a substantial interference with the way quite sufficient to give ground for an action or proceeding for obstruction of the highway if it was one. And it was certainly a most distinct assertion of right quite inconsistent with an intention to dedicate.

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In Mytton v. Duck, 26 U. C. R. 61, upon which the trial Judge chiefly if not wholly based his conclusion, the evidence was of continuous uninterrupted user for 30 years without objection or interference on the part of any person. There were no countervailing circumstances. And Draper, C.J., seems to have laid peculiar stress upon that state of facts as furnishing conclusive evidence of dedication. There also the origin of the road was obscure. No such circumstances or condition of affairs appeared as are apparent in this case, and which quite distinguish it from the earlier case.

The evidence as to the work done by defendants on the track is conflicting. It goes no further than to shew that at times workmen engaged by defendants to do work on the streets in defendants' municipality did some at times on the track, but it does not appear to have been done at regular times or periods. According to the evidence of the Misses McGlashan, it was only done on two or three occasions between 1884 and 1897, and other testimony goes to shew that it was sporadic and unsystematic. It does not appear that specific directions were given for performance of work there, but the workmen being directed to scrape the streets sometimes included this track with the others. The payments that were made were simply payments to the men for their time in general, and there were no specific payments in respect of work done in this part of the municipality.

In The Queen v. Rankin, 16 U. C. R. 304, it was shewn that much statute labour and public money had been expended upon the way in question over a period of 10 years before the defendant was indicted for obstructing it. Dealing with this branch of the case Sir John Robinson, C.J., said: "The fact of the public using it for 10 years or expending money upon it between 1846 and the present time is not sufficient to establish it as a lawful highway against the will of the owner of the soil, where there is no sufficient ground for presuming a dedication." In St. Vincent v. Greenfield, 15 A. R. 567, Osler, J.A., delivering the judgment of the Court, said (p. 571): "If the road had been laid out and dedicated by the landowner the performance of statute labour upon it or the expenditure of public money in opening it is evidence of its acceptance and establishment as a highway by the municipality, but the

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continued performance of statute labour upon a road which was in its inception a trespass road does not, in my opinion, by force of the statute absolutely make such a road a public highway. It may at most raise a presumption of dedication, or be evidence from which a dedication by the owner may be inferred, and may throw upon him the onus of rebutting such presumption or inference. I do not think it has any higher effect." Having regard to the known circumstances connected with this way, it should require much more definite and undisputed evidence as to the work done or money expended to give rise to any inference against the original declared intention to close the road as a highway. It is to be observed that the trial Judge in his judgment appears to have attached little, if any, weight to this part of defendants' case.

On the whole evidence, and having regard to the manner in which the alleged user first began, the qualified nature of the user in the later years, the acts of interruption and the other circumstances, it does not appear that defendants have clearly and satisfactorily established the existence of the public right they have asserted. Sufficient has been shewn to rebut any presumption of intention to dedicate or rededicate this old highway to the use of the public, and, that being so, defendants' case fails. The judgment, therefore, should be in plaintiffs' favour.

It was contended that the action was not maintainable without the Attorney-General being a party. The form of the action and the relief claimed are similar to those in Chinnock v. Hartley Wintney Rural District Council (supra). But the point made here is that if this has become a public highway the soil has become vested in the Crown and not in the municipality. The objection does not appear to have been taken until the trial. Whatever view may ultimately be taken of the effect of dedication of a highway by an individual, having regard to secs. 599 and 601 of the Municipal Act, it seems clear that in this case dedication would vest in defendants a right of property in the highway sufficient to enable the action to proceed without the presence of the Attorney-General. It is not absolutely essential to the maintenance of the action.

On the argument of the appeal counsel for defendants sought to be relieved from the admisssion of plaintiffs' title and to be allowed to shew defects therein.

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The admissions appear to have been made deliberately, and no special ground is made for opening the question at this stage.

Plaintiffs objected to defendants' course in this respect, and it would certainly not be convenient to discuss now questions of title which were not before the trial Judge, and as to which this Court is without the benefit of his opinion.

The appeal should be allowed and judgment entered for plaintiffs with costs throughout.

MEREDITH, J.A., reached the same conclusion, for reasons stated in writing.

GARROW and MACLAREN, JJ.A., also concurred.

JANUARY 22ND, 1907.

C.A.

MONARCH LIFE ASSURANCE CO. v. BROPHY.

Company — Subscription for Shares — Contract to Assign Mortgage in Payment—Powers of Provisional Directors of Life Insurance Company—Acceptance of Assignment of Mortgage—Advance of Funds of Company—Ultra Vires — No Concluded Agreement — Specific Performance — Damages.

Appeal by plaintiffs from judgment of ANGLIN, J., after trial without a jury, dismissing the action without costs.

Plaintiffs alleged a subscription by defendant for 100 shares of the capital stock and an agrement to pay $1,500 thereon on 13th September, 1904, and a further sum of $1,500 thereon on 13th November, 1904. They also alleged an agreement by defendant to assign to them a mortgage dated 4th August, 1891, from one Frederick Pape to defendant, securing $2,930 and interest on 100 acres of land in the county of Hastings, in satisfaction of the two sums of $1,500 each, and averred that defendant, in pursuance of the agreement, delivered the mortgage, but afterwards sur-

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reptitiously procured it from an officer of plaintiffs and threatened to resell or otherwise dispose of it. They further alleged that the subscription was accepted, and the shares allotted, but defendant refused to execute an assignment of the mortgage or to pay the said two sums of $1,500. And they claimed payment of $3,000 and interest, specific performance of the agreement, and an injunction restraining a sale or assignment of the mortgage to others.

Defendant denied plaintiffs' claim and stated that he was not indebted to plaintiffs and that he did not agree to assign the mortgage. An application, made on his behalf at the trial, to amend the statement of defence by alleging that the application for shares was procured from him through the fraud and misrepresentation of plaintiffs' agent, was ordered to stand pending the taking of the evidence, and was ultimately refused, the trial Judge being of the opinion that the evidence did not support the allegations of the proposed amendment.

The appeal was heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, MEREDITH, JJ.A.

M. Wilson, K.C., for plaintiffs.

C. A. Masten, for defendant.

MOSS, C.J.O.:—Plaintiffs put in evidence a paper signed by defendant on 13th September, 1904, being a printed form of application addressed to the directors of plaintiffs, and requesting them to allot to defendant 100 shares, on the terms of the prospectus, and agreeing to accept the same or any smaller number that might be allotted to him, and to pay into the Sovereign Bank the sum of $1,500. But it was agreed on all sides that this paper did not represent the whole dealing with defendant with regard to the matter. From the first defendant declined to deal for the shares unless some arrangement could be made by which the mortgage in question could be made use of as a means of making the first payments. There was much discussion of the question first between defendant and plaintiffs' agent, then between plaintiffs' officers and their solicitors, and finally between plaintiffs' manager and defendant.

The result of the evidence is, and the trial Judge so found, that defendant's application for the shares was con-

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ditioned upon plaintiffs agreeing to purchase from him the mortgage at its face value, the amount being paid to him upon his assigning the mortgage. The value represented by the amount understood to be due under the mortgage had been made up in the form of a statement which shewed the value to be $3,977.39. A cheque for this amount payable to the order of the defendant and dated 11th October, 1904, was drawn and signed ready to be handed over to defendant upon the execution by him of an assignment which had been prepared. On 12th October defendant met plaintiffs' manager at their offices in Toronto, and the arrangement was discussed. Plaintiffs' manager wished, and so stated to defendant, that when the cheque for $3,977.39 was handed over to him defendant would pay the sum of $3,500 on the shares, but defendant asked to be allowed to pay only $3,000, leaving the $500 to be paid in the following June. This was assented to, and, as the transaction then stood, plaintiffs were to give defendant their cheque for $3,977.39, and he was to give them his cheque for $3,000.

But defendant was not willing to close the transaction on that day. He had received some information about the affairs and standing of the company, and he wished to postpone the completion of the matter.

He expressed doubts as to whether the amount set forth in the statement as due under the mortgage was correct, and requested to be allowed to take the papers with him in order to ascertain whether credit had been given for some payments by the mortgagor, which, if not credited, would reduce the face value. His request was acceded to, and he took with him the statement, the mortgage, and—it is said—the assignment as prepared for his signature. The matter remained in abeyance until 17th October, 1904, when defendant wrote plaintiffs' manager as follows: "I see difficulties ahead of me that I did not expect when I was in Toronto, and I have to fall back on the payments I get from the Pape mortgage to help me through, so I could not take any more stock in your company for the present, but, if I cannot find a suitable tenant for the farm I live on and must dispose of it, I may deal with you further on."

This was a distinct refusal to proceed further with the assignment of the mortgage and a definite withdrawal of the offer to subscribe for the shares if defendant was then in a position to withdraw.

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And, as the assumption by defendant of liability for the shares was conditioned upon the payment by plaintiffs to him of the value of the mortgage upon receiving an assignment if that transaction was one which could not be carried into effect at the time it was entered into, there was no contract which could be enforced.

To ascertain this it is necessary to inquire into the extent of the power and authority of those by whom the affairs of the plaintiff company were being conducted. Plaintiffs were incorporated by an Act of the Parliament of the Dominion, 4 Edw. VII. ch. 96.

By sec. 1 certain named individuals, together with such persons as became shareholders in the company, were incorporated under the name of "The Monarch Life Assurance Company."

By sec. 2 the persons named in sec. 1, "together with such persons not exceeding 8 as they associate with them, shall be the provisional directors of the company, a majority of whom shall be a quorum for the transaction of business." It is to be observed that under this provision persons who are not shareholders may be brought in to act as provisional directors to a number exceeding that of the original projectors. And, as might be expected, only limited powers are conferred upon them. The powers are defined by sec. 2 as follows: "They may forthwith open stock books, procure subscriptions or stock for the undertaking, make calls on the stock subscribed, and receive payments thereon, and shall deposit in a chartered bank in Canada all moneys received by them on account of stock subscribed or otherwise received by them on account of the company, and shall withdraw the same for the purposes only of the company, and may do generally what is necessary to organize the company."

The concluding words furnish the key to the extent of their powers, and shew that all that they are to do is in the direction of the organization of the company and nothing beyond. Their control over the funds is limited to depositing in a chartered bank and withdrawing only for the purposes of the company. It is obvious that the power of withdrawal here given does not extend to the general purposes of the company, but only to such purposes as are necessary in the work of organizing the company. It would not be

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reasonable to say that the provisional directors, constituted as they are, could embark the moneys received in any form of dealing or investment before the company had attained the position of an organized body, and a board of shareholder directors had been elected by the shareholders as provided by sec. 4 of the Act. By that section the provisional directors are required to call a general meeting of the shareholders so soon as $250,000 of the capital stock have been subscribed, and 10 per cent. of that amount paid into some chartered bank in Canada, at which meeting the shareholders who have paid not less than 10 per cent. on the amount of shares subscribed are to elect a board of not less than 7 nor more than 25 directors, of whom a majority is to be a quorum. And no person shall be a director unless he holds in his own name and for his own use at least 50 shares, and has paid all calls and other liabilities to the company.

But even after this has been done there is a further restriction contained in sec. 6, wherein it is provided that the company shall not commence the business of insurance until $62,500 of the capital stock has been paid in cash into the funds of the company, to be appropriated only for the purposes of the company under the Act.

Now at the time of the transaction with defendant in question the company's position had not reached the stage when the provisional directors could call a general meeting under the provisions of sec. 4, much less when the company could commence the business of insurance according to sec. 6. The company was still in the process of being prepared for organization. It was not absolutely certain that it would ever be fully organized or be in a position to commence the business of insurance. Meantime the funds paid in by subscribers for shares were to remain in a chartered bank, and were not to be touched except for purposes necessary to the organization of the company.

The provisional directors were alive to this, for at their first meeting held on 27th July, 1904, after passing by-laws providing, amongst other things, for the appointment of a managing director and an executive committee, they resolved "that the organization of the company be continued by the managing director under the direction of the executive committee, but that no moneys be paid out except upon the cheque

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of the chairman of the executive and the managing director, and that in no event shall any of the money paid in upon the stock (other than premiums as authorized by the subscribers or by the board) be paid out until after the organization shall have been completed and directors elected by a general meeting of the shareholders." The affairs of the company continued to be in the hands of the provisional directors until 7th December, 1904, when a general meeting of shareholders was held and a board of directors was elected. Such business as was transacted was chiefly done by the executive committee, and, so far as the records shew, such dealings as there were with defendant in respect of the transaction in question were conducted by the manager and the executive committee without reference back to the provisional directors. It is almost needless to say that in no case could these directors confer on any committee higher powers than they themselves possessed. But, further, in no part of the Act of incorporation or in the sections of the Companies Clauses Act incorporated into it, is there any express power to delegate to committees the powers to act conferred on the board of provisional directors.

The application for the 100 shares was signed by defendant on 13th September, 1904, and in the minutes of the meeting of the executive committee held on 14th September, the following entry appears: "Moved by Dr. Forbes Godfrey, seconded by Wm. Scott, that the mortgage be bought from Rev. George Brophy, and a cheque issued for the same, and our solicitors instructed to have the said mortgage transferred to the Monarch Life Assurance Company. Carried." Then at a meeting of the committee held on 21st September, on motion of Mr. T. Marshall Ostrom, seconded by Dr. Forbes Godfrey, it was resolved "that the application from Rev. George Brophy for 100 shares of the capital stock of the Monarch Life Assurance Company be accepted and the stock allotted to him."

Then, in consequence no doubt of defendant's letter of 17th October, at a meeting of the committee held on 19th October, on motion of Dr. Forbes Godfrey, seconded by D. W. Livingstone, it was resolved "that T. Marshall Ostrom be authorized to go to Belleville to settle with Rev. Father Brophy re subscription and mortgage."

Nothing further is recorded, except that in the minutes of a meeting of the provisional directors held on 7th Decem-

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ber, defendant's name appears in a list of shareholders as the holder of 400 shares, a statement which appears to be erroneous in any case. The action was commenced on 24th December, 1904.

All that had been done up to that time was done by the executive committee and the manager, or at the highest by the provisional directors. It was doubtless within the powers of the latter to accept applications for shares and to receive payments on account, but that is not the same thing as assuming to enter into an arrangement or agreement by which, in order to induce a person to subscribe for shares, they are to advance out of the funds of the company to the intending subscriber moneys required to enable him to make payments on the shares. As already pointed out, the provisions of the Act of incorporation and the resolution of 7th July, 1904, were directed against any such action on their part. And there appear to be no general powers which would enable them to so deal with funds of which they were merely custodians until the organization of the company. The remarks of Gwynne, J., in In re North Simcoe and City of Toronto, 36 U. C. R. 101, at pp. 104-106, and the very full discussion of the powers of provisional directors under an Act incorporating a railway company shew the necessity for strictly confining the powers of such bodies. If the provisional directors could use the moneys of the company as they proposed to do in this case, there is nothing to prevent their dealing in the same way with all the moneys of subscribers paid into the bank, thus practically nullifying the provisions of secs. 2, 4, and 6 of the Act.

Their proposed action was beyond their powers and could not bind the company. If defendant desired to compel plaintiffs to carry out the agreement to take his mortgage and advance the moneys, one sufficient answer would be that the company were not bound, though other answers might also be suggested. That being so, how can plaintiffs be in any more favourable position when seeking to enforce it against defendant?

The result is that, as the trial Judge has found, there never was a concluded agreement. There was no concluded agreement binding defendant to assign the mortgage, because of the want of power of the executive committee or the provisional directors to enter into it or bind the company by it. And there was no concluded agreement to take the shares,

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because the application was based and conditioned upon the supply by plaintiffs of the funds for payment of the first two instalments, by means of a transaction which the persons having the conduct of their affairs were not empowered to enter into.

The transactions were not separate nor—upon the facts—separable, but were one and indivisible. But, if they were, the claim of plaintiffs for specific performance of the alleged agreement to assign the mortgage could not succeed. At the most its breach would only be ground for an action for damages: Rogers v. Challis, 27 Beav. 175; Scehel v. Mosenthal, 30 Beav. 371; Fry on Specific Performance, 4th ed., p. 22.

Further, there was no allotment by the provisional directors of any shares.

And, for the reasons assigned as well as for those given by the trial Judge, defendant could not be held responsible on his application. But the case can be rested on the ground of the inseparable or indivisible character of the transaction, and the impossibility of giving effect to a dealing ultra vires of the parties by whom it was assumed to be entered into.

The appeal should be dismissed with costs.

MEREDITH, J.A., gave reasons in writing for the same conclusion.

OSLER, GARROW, and MACLAREN, JJ.A., concurred.

JANUARY 22ND, 1907.

C.A.

CANADIAN PACIFIC R. W. CO. v. GRAND TRUNK R. W. CO.

Specific Performance—Contract to Divide Specified Land to be Acquired by Defendants—Acquisition by Defendants of Part only—Claim of Plaintiffs to Half of Land actually Acquired—Right to Less than Half with Abatement in Price—Railway Company—Railway Act—Order of Board of Railway Commissioners—Agreement not to Bid at Sale—Validity.

Appeal by plaintiffs from judgment of TEETZEL, J., 8 O. W. R. 254, after trial without a jury, dismissing an action

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for specific performance of an agreement to divide certain lands.

The appeal was heard by Moss, C.J.O., OSLER, GARROW, MACLAREN, MEREDITH, JJ.A.

E. D. Armour, K.C., and Angus MacMurchy, for plaintiffs.

M. K. Cowan, K.C., for defendants.

MOSS, C.J.O.:—The facts of the case are simple, and it is somewhat surprising to find not merely that two corporations are disputing over their rights in the matter, but that one of them should have desired to set up and should have been permitted to put upon record defences such as have been insisted upon at the trial and on the appeal.

In 1901 the Province of Ontario, being the owner of a triangular parcel of land in the city of Toronto, lying between rights of way owned by the plaintiffs and defendants respectively, was offering the same for sale by tender. It was of interest and importance to plaintiffs and defendants to secure the parcel, or at least a portion of it, for the purposes of their respective railways, and it occurred to the officials of defendants that the interests of both companies would be served by their not bidding against each other. Accordingly defendants proposed to plaintiffs that, if the latter would not bid against them, they would, in the event of their securing the parcel, let the latter have a portion at the same price as they paid.

And it was finally arranged that plaintiffs should make no attempt to secure the parcel, and, if defendants secured it, that plaintiffs should have the right to purchase one half at any time within 5 years, paying one half the amount paid to the Crown, with interest at 5 per cent. per annum. A sketch or plan shewing the division proposed by plaintiffs in case defendants secured the parcel, was prepared and submitted to defendants. It shewed the parcel divided into two equal portions, the northerly half, which lies contiguous to plaintiffs' right of way, being allotted to them, and the southerly half, which lies adjacent to defendants' right of way, being allotted to them. The whole parcel contained a little over 19 acres. No objection was made at the time to the division proposed by plaintiffs.

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In accordance with the agreement, plaintiffs refrained from any attempt to secure the parcel, and defendants were left alone to deal with the Crown. The latter withdrew from sale a portion of the land, about two acres in extent, situate at the north-west angle, leaving a block of something more than 17 acres, and, after a good deal of delay, defendants obtained a grant from the Crown by letters patent dated 28th March, 1903, of the remaining 17 acres and over, for the sum of $32,500.

Plaintiffs thereupon made application to defendants for a conveyance of one half of the parcel granted to them, and offered and were willing to pay one half of the purchase money with interest, in accordance with the agreement and understanding between them. Defendants did not then raise any objection to plaintiffs' right to one half of the land, but started difficulties as to the mode of division. Plaintiffs naturally wished the division to be on the same footing as shewn in the plan or sketch of the 19 acres, thus leaving to defendants the southerly half adjacent to their right of way. Defendants however wanted such a division as would secure to them the entire frontage of the 17 acres on Pacific avenue, a public highway on the west side of the land, and they prepared and forwarded a sketch or plan shewing a division which had that effect. This was, of course, not satisfactory to plaintiffs. They pointed out that it was not in accordance with the understanding in the first instance, and it did not let them utilize the property to the full extent contemplated. Defendants replied that they could not agree to any other division than that proposed by them as shewn on their sketch or plan, their letter concluding with the statement that if it was not satisfactory to plaintiffs, defendants were perfectly willing to retain ownership of the whole property, a proposal which plaintiffs not unnaturally regarded as a complete subversion of the original intention upon which the lands were acquired. After some further attempts at adjustment this action was commenced.

By their defence defendants wholly repudiated the agreement, and set up that if there had been any arrangement it had terminated upon the withdrawal by the Crown of the two-acre parcel. When the case came to trial they applied for and ultimately obtained from the trial Judge leave to set up a further defence to the effect that by reason of certain proceedings before, and an order made by the Board of

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Railway Commissioners authorizing them to constitute a branch line on a portion of the lands in question, plaintiffs were estopped from setting up any claim to any portion of the lands. And they further took the position that the lands were required for the purposes of their railway, and they could not alienate any portion of them. They also maintained in argument before this Court that because the agreement was that the parties should not bid against each other it was illegal and not binding. They did not, however, set up or obtain leave to set up by express allegation in pleading their own turpitude in this respect.

The trial Judge disposed of the case adversely to plaintiffs, on the ground that the agreement was limited to the parcel as shewn on the plan or sketch sent by plaintiffs in the first instance, when it was supposed the whole 19 acres would be secured, and to the mode of division there indicated, and that an equal division of the 17 acres actually obtained was not within the terms or scope of the agreement. He thought plaintiffs were claiming a portion of land in respect of which no agreement was made giving plaintiffs any right or interest therein, and that there was no agreement entitling plaintiffs to a declaration that they were jointly interested with defendants in the whole property. To use his own language, "the agreement was limited in its terms to specific property, and of course cannot be enlarged by the Court. For this reason and without determining whether the agreement was for any purpose binding upon defendants as a railway corporation, I think plaintiffs' action fails and must be dismissed with costs, but without prejudice to any action plaintiffs may be advised to bring in respect to the balance only of the northerly half of the original triangle, with an abatement from the purchase money."

It is not easy to see why, if there is a question of plaintiffs' right to obtain relief as to some part of the land, it should not be finally determined in this action without putting plaintiffs to the necessity of bringing another action.

All the facts have been developed, and there is no difficulty in making any necessary changes in the pleading that might be deemed necessary to enable the relief to be given if the facts and law justify it. Defendants could scarcely complain of the allowance of amendments in view of what was

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accorded to them in that direction. But there seems good ground for holding plaintiffs entitled to judgment for one half of the parcel acquired.

The Statute of Frauds has not been pleaded, and it is open to the Court to deal with the case on the whole evidence, oral and documentary. This is not an ordinary case of an agreement for sale and purchase of land, and should not be disposed of on precisely the same principles as are applicable to such agreements. It is obvious that the intention of the parties was that the land was to be obtained for their mutual benefit, not that one should get any advantage over the other. The very purpose of one abstaining from competing with the other was to enable the one tendering to acquire and hold in such manner as to enable each to make use of one half, the party refraining from tendering to contribute or make good one half of the outlay which the other made in order to acquire the whole for the common good. The understanding and agreement to that effect plainly appears not only from what took place before but from what took place after the parcel was acquired. That was defendants' understanding even up to the time of the commencement of the action. The map or sketch enclosed to plaintiffs in defendants' letter of 19th March, 1904, shews a partition in moieties, and in the letter defendants say that they are "charging you (the plaintiffs) on the basis paid for the property or $16,250 with interest at 5 per cent. as agreed from April 23rd, 1903, to be paid on delivery of deed."

They do not give one half the land as a concession, but treat it as a matter of course and of right that plaintiffs should get one half the area. The only difference is as to how the one half should be set apart.

It was, no doubt, contemplated in the first instance that 19 acres would be obtained, but it never was intended that in the event of defendants' application proving unsuccessful as to a comparatively small portion, the original agreement and understanding on which they were to be allowed to deal alone for its acquisition should be considered as inapplicable to the substantial portion of which they were enabled to obtain a grant. It was manifestly an agreement for the acquisition and partition of the lands, or whatever portion of them could be acquired in the absence of opposition from plaintiffs. The consideration was that plaintiffs should abstain from bidding, leaving the field open to defendants. And it is not

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open to defendants, having through their means obtained the lands, to repudiate or refuse to carry out their part of the agreement.

The defendants' argument that such an agreement is illegal and not binding is untenable. In Galton v. Emuss, 1 Coll. 243, the same objection was raised, but the Vice-Chancellor of England, Sir Lancelot Shadwell, refused to give effect to it. The point was again taken in In re Carew's Estate, 26 Beav. 187. Galton v. Emuss was not cited or referred to, but the Master of the Rolls, after consideration, came to the same conclusion, saying: "I am not aware of any case or of any principle which establishes that such an agreement is inequitable." The rule established by these authorities still governs, and, as said by Spragge, C., in Campion v. Brackenridge, 28 Gr. 201, at p. 204: "It is well settled law that an agreement between two persons, both of whom are desirous of purchasing the same estate, that one shall abstain from bidding (receiving therefor a valuable consideration) and leaving the field open to the other, is a lawful agreement, and the agreed consideration may be enforced."

Here the agreed consideration was clearly the right to receive from defendants an equal part of the acquired estate, and it ought to be enforced in the absence of any valid answer to the claim.

From the very nature of the case it is apparent that it can be no answer to say that the lands are required for the purposes of defendants' railway, and they are unable to dispose of them. These lands were not acquired nor are they held for the sole purposes of defendants. If they had desired to acquire them for such purposes they would know that they could not do so by the means they adopted. And they can scarcely desire to now take the position that they deliberately induced plaintiffs to stand aside with the intent to defraud them out of any share in the lands when acquired. But, even if the defence was open, they have failed to prove it on the evidence. The testimony of their superintendent of the middle division shews that the northern part or trail of the parcel is not necessary for the purposes of the railway at present, and he is unable to make any intelligible surmise or even reasonable guess at uses to which it may be put in the future. And the fact that they were willing to convey it, if only the

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front on Pacific avenue was conceded, shews how little foundation there is for the present contention.

The proceedings before the Board of Railway Commissioners, and their order produced, even if admissible, afford no protection to defendants against plaintiffs' claim. The matter in issue on the occasion in question has no reference to the matter now in dispute, in so far as plaintiffs were concerned. They were not notified that any claim was being made inconsistent with or hostile to their rights under the agreement by means of which the lands were acquired. The sole question was with reference to the constitution and expense of a diamond crossing on Pacific avenue, where defendants' track along that highway crossed plaintiffs' tracks. The defendants did not claim before the Board of Commissioners a declaration of right to lay a track over lands to which plaintiffs were entitled nor notify plaintiffs of any such contention.

And nothing took place before the Board indicating that any such question was mooted or dealt with. There is nothing in those proceedings to estop plaintiffs from asserting their right to one half of the land. The most that can be said is that the position of the track laid down by defendants, so far as its curve towards Pacific avenue takes a portion of the east front on that highway, may require to be taken into consideration in making division between plaintiffs and defendants of the 17 acres.

Plaintiffs have shewn themselves entitled to a conveyance of one half the land acquired from the Crown by defendants, but, inasmuch as they are unable to agree upon the mode of division, it must be referred to the Master in Ordinary to make a proper division and to settle a proper conveyance to be executed by defendants to plaintiffs upon payment of $16,250 and interest at 5 per cent. from the date of the purchase from the Crown.

It is not a case for saying that interest should not continue to run. The form of conveyance was not agreed upon, and no tender of the money was made. Further, the question as to the exact parcel to be conveyed is yet to be settled.

Plaintiffs are entitled to their costs of the action and of the appeal.

OSLER, GARROW, and MACLAREN, JJ.A., concurred.

MEREDITH, J.A., dissented, for reasons stated in writing.

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JANUARY 22ND, 1907.

C.A.

NATIONAL MALLEABLE CASTINGS CO v. SMITH'S FALLS MALLEABLE CASTINGS CO.

Trading Company—Contract — Consideration—Partly Executed Contract—Absence of Seal—Authority of President —Absence of By-law or Resolution—Directors—Powers of—Contract Involving Extension of Plant and Increase of Capital—Construction of Contract—Extent of Orders —Power of Cancellation.

Appeal by defendants from judgment of FALCONBRIDGE, C.J., 7 O. W. R. 436, in favour of plaintiffs in an action for damages for breach of a contract.

The appeal was heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, MEREDITH, JJ.A.

W. Cassels, K.C., and W. D. McPherson, for defendants.

J. H. Moss and C. A. Moss, for plaintiffs.

GARROW, J.A.:—Plaintiffs' claim is that defendants on 6th January, 1905, entered into an agreement in writing with plaintiffs to furnish to plaintiffs such malleable iron coupler parts as plaintiffs might order between 6th January, 1905, and 31st December, 1907, and further agreed that upon receipt of written instructions they would furnish such malleable parts in any required quantity up to 20 couplers per day beginning 15th February, 1905, and continuing till 1st June, 1905; then beginning 1st June, 1905, defendants were to increase the rate of production so as to furnish to plaintiffs any quantity required up to 40 couplers per day during the remainder of 1905; then beginning 1st January, 1906, defendants were to further increase their rate of production so as to furnish plaintiffs any quantity required up to 100 couplers per day during 1906 and 1907; that on 6th February, 1905, plaintiffs gave to defendants written instructions to furnish malleable parts at the rate of 20 couplers per day from 15th February, 1905, to 1st June, 1905, and from 1st June, 1905, at the rate of 40 couplers per day until further

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notice; that plaintiffs required in carrying on their business the full quantity of couplers so ordered, and during 1906 and 1907 would require couplers at the rate of 100 per day; that on or about 10th April, 1905, defendants notified plaintiffs that they would not carry out the contract, and twice refused to carry it out; and plaintiffs claimed $60,000 damages.

Defendants denied the contract, denied the authority of their manager to make such a contract, claimed the benefit of the Statute of Frauds and of R. S. O. 1897 ch. 146, sec. 9, and pleaded that there was no consideration for the making of the alleged contract, and no mutuality of obligation.

At the trial the Chief Justice found the issues against defendants, and directed a general reference to ascertain plaintiffs' damages.

The contract relied on is in the form of a letter addressed to plaintiffs signed by defendants (omitting the word "Limited"), by Wm. H. Frost, president and general manager, and at the foot the one word "accepted," subscribed with plaintiffs' name, by Henry F. Pope, assistant treasurer.

The letter begins: "We agree to furnish such malleable iron coupler parts, including heads, etc., as you may order between this date and December 31st, 1907, on the following terms and conditions." Then follow prices, terms of payment, rate of production, assembling and fitting, and other details of similar character. Under the head of rate of production this is said: "Upon receipt of your written instructions we will furnish malleable parts in any required quantity," etc., giving details, which need not here be repeated.

. . .

On 2nd February, 1905, plaintiffs sent to defendants an order in writing (No. 7503) for 6,000 couplers, but in the order stated "any portion or all of this order subject to cancellation if we find it necessary." No portion of the order had, however, been cancelled when defendants finally refused to perform on 10th April, 1905.

On 6th February, 1905, plaintiffs wrote to defendants a letter in which they say: "Referring to your contract with us dated 6th January, 1905, and to our order 7503 dated 2nd February, 1905, we beg to hereby give you instructions to produce couplers at rate of 20 couplers per day from 15th February to 1st June, 1905, and then beginning 1st June, 1905, at rate of 40 couplers per day until further notice."

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A further order dated 10th March, 1905, was also sent to defendants (No. 7871).

Plaintiffs are a foreign corporation, with head office in the State of Ohio. Defendants are also a corporation, incorporated under the statutes of Ontario by letters patent dated 9th July, 1903, by which William Henry Frost, Fanny Burton Frost, Laura Agnes Frost, James Edwin Frost, and Laura O'Meighin Frost, and any others who became subscribers, were incurporated for the purpose of manufacturing and selling malleable iron and other castings, and of carrying on the business of an iron founder, and for the said purposes to acquire the business and assets of the business carried on by the said William Henry Frost under the firm name of the Smith's Falls Malleable Iron Works, and to extend the same and to assume the liabilities thereof. And the capital stock was thereby fixed at $150,000 in shares of $100 each. Stock to the amount of $138,500, or 1,385 shares divided among 8 subscribers, was taken and paid up in full, the balance of $11,500 remaining apparently wholly unsubscribed. The company took over the business formerly carried on by W. H. Frost, and he was appointed president and managing director. No by-law, however, seems to have been passed to authorize taking over the old business, nor, so far as appears by the minutes, was any price fixed for it. Nor was any by-law passed defining the general powers of the board of directors or of the managing director, except as to the power of borrowing money for the purposes of carrying on the business: see R. S. O. 1897 ch. 191, sec. 81.

Defendants' managing director did not consult the board before signing the letter of 6th January, 1905, and there is no formal subsequent approval by the board of what had been done, nor, on the other hand, was there ever any formal or other dissent by the board; in fact, so far as appears by the minutes, no board meeting was held between October, 1904, and June, 1905. W. H. Frost knew on 6th January, 1905, that to carry out the proposed contract more extensive plant and premises than those owned by defendants would be necessary, such extensions calling for an additional expenditure of probably $40,000. . . .

It may fairly be inferred that plaintiffs also knew that the full performance of the contract would require a substantial increase of defendants' plant. But there is no evid-

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ence that they knew anything about defendants' capital or commercial circumstances, or their ability to furnish the additional plant.

Defendants before us contended that the contract, if any, is void because Mr. Frost, as president and manager, had no authority, either express or by virtue of his office, to enter into such a contract; that the contract would even be void as ultra vires of the board of directors themselves, because it necessarily involved a large extension of the plant and an increase in the capital of defendants; that the absence of the corporate seal is fatal; that the want of mutuality of promise is also fatal; and that in any event the contract is binding only to the extent that the offer contained in the letter of 6th January, 1905, was accepted by plaintiffs.

Defendants are practically a "one man" company. Mr. Frost, who owned the former business, practically owns the same business now, carried on in the name of the incorporated company, for of the total share capital of 1,375 shares, he is the holder of 1,240. And he has apparently been allowed by the board of directors to manage it practically as he pleased. This would not, of course, alter the fact that the business now really belongs to the company and not to Mr. Frost, and that the law respecting such companies is applicable, but should have some bearing upon the inferences, if any to be drawn, of the authority possessed by him or to be presumed as conferred upon him by the board.

Apart from the other objections, the contract is in its nature one which prima facie the board of directors might lawfully enter into. It is, although extensive and important, after all only one to manufacture and supply articles of the kind for the manufacture and sale of which defendants were expressly organized, namely, malleable iron castings. And, that being so, the board of directors would certainly, I think, have had power to bind the company by entering into such an agreement. And if the board could lawfully have done so, they could also, I think, have authorized the manager to do so for the company. And, in the total absence of bad faith or notice, plaintiffs were entitled to assume that he had been duly clothed with the real authority which he was ostensibly exercising in entering into the contract in question: see R. S. O. 1897 ch. 191, secs. 46, 47, 81; Thompson v.

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Brantford Electric and Operating Co., 25 A. R. 340; Royal Bank v. Turquand, 5 E. & B. 248, 6 E. & B. 327.

And, although not without some doubt, I have also reached the conclusion that the circumstance that the contract required for its full or maximum performance an increased plant is not in itself sufficient to render the whole ultra vires. It would have been otherwise if such increased plant had been required to carry on a new or different business from that then being carried on by defendants. The plant already in existence was, with some small additions, apparently sufficient to turn out a limited quantity of the articles required. And the new or additional plant was only apparently required in case orders up to the maximum were given. Under these circumstances, the question of supplying such additional plant would, I think, apparently fall under the head of "management," and would, therefore, be within the general scope of the directors' authority. The question of ultra vires cannot, of course, be made to depend upon the further question whether the contract was or was not beneficial to defendants. When business men enter into a business contract, they do so, it may be assumed, with the object of mutual benefit to flow from its performance. Freedom of contract is an excellent thing, to be encouraged in every reasonable way, but the contractor who takes the chance of gain must not lightly be excused from taking the opposite chance of loss if he has miscalculated. Benefit or no benefit has therefore really no bearing upon the question of ultra vires, especially in an action brought simply for damages for an alleged breach. It would be different in result, although not in principle, if the action was one for specific performance, in which form of action the Court has always considered hardship or unreasonableness a circumstance which might justify withholding that particular form of relief. The defence of ultra vires would, in the case of an executory contract, of course, necessarily be open to both sides. And it would, I think, be a strong proposition, too strong to be maintained, that if the contract in question had turned out to be highly beneficial to defendants, plaintiffs could have repudiated, on the ground that defendants' manager had no power to supply the requisite additional plant to enable the contract to be performed.

The next point is as to the absence of the corporate seal.

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The common law rule was strict that all contracts by a corporation must be executed under the common seal. But it was early departed from in the case of commercial or trading companies in matters of trivial or every day occurrence. And this departure widened until it included practically all executed contracts with which a seal would have been lawful.

But in the case of executory contracts such as the one in question, although the apparent tendency has been towards greater freedom, it cannot be said that the Courts have yet fully approved of placing them entirely in the same category with executed contracts. . . .

[Reference to South of Ireland Colliery Co. v. Waddle. L. R. 3 C. P. 463, L. R. 4 C. P. 617; Australian Royal Mail Steam Navigation Co. v. Maryetti, 11 Ex. 288; Wingate v. Enniskillen Oil Refining Co., 14 C. P. 379; Pim v. Ontario, 9 C. P. 304; Bernardin v. Dufferin, 19 S. C. R. 581, 610; Garland v. Northumberland Paper Co., 31 O. R. 40; Finlay v. Bristol and Exeter R. W. Co., 7 Ex. 409.]

There may be reasons for refusing to imply a parol contract, in the case of a trading corporation, which could under similar circumstances be implied between individuals. Finlay v. Bristol and Exeter R. W. Co. and Garland v. Northumberland Paper Co. are, no doubt, authorities for that position. But, if the . . rule laid down in South of Ireland Colliery Co. v. Waddle is to be fully adopted, and I think it should be, these cases seem to me at least illogical, survivals in fact of the older and narrower rule of the common law. For, if a trading corporation may be bound by an express contract not under seal, I am unable to understand why they should not also be bound by a similar contract implied by law in the interests of justice—always providing of course that the contract to be implied would have been unobjectionable if it had been under seal.

Upon the whole, I concur in the opinion of the Chief Justice of the King's Bench that the contract in question is one falling within the rule laid down in South of Ireland Colliery Co. v. Waddle, and is therefore not one requiring the corporate seal.

Upon the question of construction I am of opinion that the letter of 6th January, 1905, even with the acceptance

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written at its foot, was merely an offer by defendants to supply the articles mentioned from time to time, upon receipt of the written orders of plaintiffs, who were not originally, nor until an order was actually given, bound to take any of such articles. In that respect the case cannot be distinguished from Great Northern R. W. Co. v. Witham, L. R. 9 C. P. 16; see also Rex v. Demers, [1900] A. C. 103; In re Gloucester Municipal Election Petition, Ford v. Newth, [1901] 1 K. B. 683. . . . And from this construction it follows that defendants might, at any time until an order was actually given, have withdrawn the offer; and that, by their repudiation of 10th April, 1905, they did effectually withdraw the offer as to all articles not then actually ordered.

But, to the extent of the orders already given, there was, in my opinion, a valid contract created by defendants' offer, followed by these orders.

The power to cancel reserved in the order of 2nd February, of course, creates a difficulty. It might have been, for that reason, wholly objected to by defendants, but no objection was made. On the contrary, they, as appears by the correspondence, treated the order as unobjectionable, and proceeded with the work. And, followed as it was 4 days later by the order of 6th February, in which the former order is referred to, it might fairly, I think, even be contended that plaintiffs themselves thereby abandoned the power of cancellation, at least to the extent of the quantities mentioned in the latter order.

The proper construction is, I think, to read the order of 6th February, so far as quantities are concerned, as included in the earlier order of 2nd February.

The true meaning of the second order is, I think, that as to the quantity already ordered plaintiffs required defendants to turn out the articles at the rate per day mentioned in the second order.

Whether the third order (N. 7871) of 10th March should also be regarded as part only of the original order, is not on the evidence quite clear. It may be that that order was merely intended to be an order to ship, out of the quantities already ordered. This can, no doubt, be made clear on the reference, which, limited to the extent I have indicated,

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should be allowed to proceed, and the appeal otherwise dismissed.

No costs of appeal.

MOSS, C.J.O., OSLER and MACLAREN, JJ.A., concurred.

MEREDITH, J.A., was of opinion that the judgment below should be affirmed.

CLUTE, J. JANUARY 23RD, 1907.

CHAMBERS.

RE HEBERT AND O'BRIEN.

Land Titles Act—Caution—Vacating—Proof of Action Begun Insufficient—Leave to Aduce Evidence—Terms.

Appeal by Hebert from order of local Master of Titles at North Bay vacating a caution lodged by the appellant against certain lands therein described.

J. B. Holden, for Hebert.

A. M. Stewart, for O'Brien.

H. E. Rose, for other persons interested.

A. W. Ballantyne, for the Attorney-General.

CLUTE, J.:—Shortly after the caution was lodged the appellant brought an action against O'Brien and others, and, on receiving notice under the Act, proved this fact before the local Master. O'Brien produced a transfer from the appellant of the lands in question.

No further evidence was given, and thereupon the Master vacated the caution.

The appellant contends that, having followed up the caution by the issue of the writ and filing of the statement of claim, he has the right to have the caution remain of force until the disposition of the suit, without offering further evidence before the local Master in support of his claim. It is contended on the other side that the Master has juris-

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diction to deal with the matter, and is the only one who can properly deal with the question, subject, of course, to appeal or stated case as provided by the Act.

Section 76, sub-sec. 2, expressly enacts that after the expiration of the time limited by notice as provided in sub-sec. 1, the caution shall cease unless an order to the contrary is made by the Master. Section 157 provides for appeal from the Master. Provision is made by the Rules for taking evidence viva voce or by affidavit. Lis pendens is not to be registered: sec. 86. The Master may state a case for the opinion of the Court: sec. 93. Inhibition may be ordered by the Court or the Master of Titles under sec. 81.

Having regard to these and other provisions of the Act, I am of opinion that the Act contemplates that the questions which may arise in its administration are to be determined as the Act provides, and that the appellant in the present case is not entitled, after lodging the caution, to issue a writ, and on proof thereof rest his case there and stay the action of the Master until after the disposition of the action. . He should proceed with his claim before the Master, and obtain, if he may, a direction to have the disputed question tried by action or issue . . . .

I think the appellant misconceived his right in the present case, and, as the question arises now for the first time, he may, if he so desires, have the order set aside on payment of costs and the matter opened up, and have leave to put in further evidence . . . . Otherwise the appeal to be dismissed with costs.

MAGEE, J. JANUARY 23RD, 1907.

TRIAL.

ATTWOOD v. PETT.

Bankruptcy and Insolvency—Assignments and Preferences—Action by Assignee for Benefit of Creditors of Insolvent Trader to Set aside Conveyances to Trader's Wife—Misstatement of Consideration—Conveyances for Value—Absence of Intent to Defraud—Action Brought after Expiry of Statutory Period—Evidence—Costs.

Action by the assignee for the benefit of the creditors of H. F. G. Pett for a declaration that the latter was the real

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purchaser and owner of lots 61, 62, 63, 64, 65, and the north part of 68, in Walkerton, and procured his vendors, the Anderson Furniture Company, to convey them to the other defendant, his wife, on 25th March, 1898, so as to defeat his creditors, and that she having on 9th November, 1898, conveyed to her husband parts of lots 64, 65, and 68, his reconveyance of the same to her on 3rd September, 1903, was fraudulent as against creditors, and further that moneys of the husband were expended in erecting buildings and making improvements on these properties to benefit the wife and defraud the creditors.

MAGEE, J.:—The evidence shewed that defendants had moved to Walkerton from Woodstock about March, 1898, and that these lots in question, with other lots, were then conveyed by the Anderson Furniture Co. to Mrs. Pett in exchange or part payment for business property in Woodstock belonging to her, or the title to which at least was in her name, the land having been purchased by her from a Mr. White some 4 years previously, and a building erected thereon. Plaintiff then sought to shew that the purchase of that property in Woodstock in her name was itself a fraud upon the husband's creditors. But it was admitted that at that time she had $1,600 or $1,700 at her own credit in the bank, and the evidence shewed that out of that money she had paid for the land, and that the buildings had been paid for wholly with her money and the proceeds of a loan of $4,000 obtained on mortgage on the property—which mortgage was still outstanding. Again plaintiff went a step back to shew that the money she had in the bank was not her own, but was really the husband's, and had been transferred to her in fraud of his creditors. Here again plaintiff failed. The money was shewn to have been the gradual accumulation by the wife during 9 years of not unreasonable sums drawn by her out of the business carried on in Woodstock at first in her name and afterwards in the husband's, but in which both took part, and that these sums were in reimbursement to her of the original capital of about $500 put in by her and interest and remuneration for her work in the shop. The business was continued in the new building, and when they left Woodstock in 1898 all creditors were paid, and the husband had some $500 of his own.

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the reconveyance of 3rd September, 1903, by
the wife. His aim in going to Walkerton in
have been to better himself by establishing
ory, in which he had great faith. He seems
romises of financial aid from a friend, whose
ed it. The exchange with the Anderson Co.
not only the lots here in question, but also
. 25, and lots Nos. 1, 2, 3, and 4, in block B.
and the company also paid about $200 for dif-
lue. Then on 9th November, 1898, she con-
husband the park lot No. 25, and also part of
5, and 68. The latter parcel is spoken of as the
park lot 25 as the factory lot—the biscuit
subsequently established on it. The consider-
d in the deed to the husband, and also in the
by him to the wife, is "love and affection and

ents of defence, as amended, simply allege that
l parcel had been conveyed to the husband "for
being used by him in connection with a biscuit
h he contemplaed building, and when not re-
h purpose was, at the wife's request, reconveyed,
ver had any beneficial interest in the land. The
called at the trial, her examination for discov-
consent read as her evidence. She stated that
husband the factory lot first, and afterwards
hinking it would make it more valuable as secur-
wn, but when it was not required she asked to
veyed to her, and it was reconveyed, as she
e it clear. Manifestly her recollection was at
th parcels were conveyed together, and there
at that time of giving security to the town or
any bonus. However, she says she thought the
rty worth $600, and he wanted to start a biscuit
she conveyed it to him for that purpose. She
g from him that he was to repay the $600, but
o get the money when the business was started,
was found that the business could not be started
ay the money, but kept on working with the
ng it. The two properties she valued at $1,000.
did not intend a gift of any of them, but always
e was to get an equivalent, and made such an
with him.

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The husband, who was examined at the trial, says that he was in November, 1898, trying to form a joint stock company to establish a biscuit factory. He failed in getting the company organized, though he kept on gathering subscriptions to the amount of $3,500—but he was ultimately granted a bonus of $5,000 by the town, the by-law therefor being passed on 21st November, 1902, and the money paid him about July, 1903. Between these two last mentioned dates he offered to include the barn lot in the mortgage to the town securing the observance of the conditions of the bonus, as the factory and machinery were not considered of sufficient value by the town officers, but it was not accepted, as the by-law would not authorize it. Thereupon the wife asked him to reconvey that parcel to her, and he agreed to do so. He says she had given him the two properties in consideration of getting it back in stock, and the factory lot was valued at $600 and the barn lot at about $300. She was, he says, to have $1,000 or $2,000 in stock. He considered the barn lot should go with the factory lot. The latter alone, however, seems to have been mentioned in the by-law.

Among the four accounts given in the statement of defence, the deed, the husband's evidence, and that of the wife, one has to arrive at a conclusion as best one may. The claim of the wife calls for the support of convincing evidence. Considering the previous carefulness of the wife for so many years in adhering to her own property, not only is her statement that no gift of either lot to her husband was intended probable enough, but any counter-presumption would almost seem precluded. It is quite possible that, while she expected money, his plan was to get her to take stock. . . . She was to have the value, and I think of both parcels. Hence the barn lot was not conveyed to the husband upon any trust or for any limited purpose, and the wife was not entitled to have it reconveyed to her. . . .

Then was the reconveyance by him to her made with intent to give the wife an unjust preference? I have no evidence as to the terms of the bonus. It may be that if the mortgage was merely to secure the employment of a specified number of workmen, or such like conditions, he looked upon it rather as an incentive to action than as a serious incumbrance, and, instead of considering himself in difficulties,

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ought the receipt of the bonus placed him on
success. If so, there may have been no in-
is creditors by the reconveyance. Upon the
me I must assume, however, that in Septem-
as insolvent, and must have known it. It is
by deeding the barn lot to his wife he separ-
rcels which he considered should go together.
for granted that he knew his insolvency, and
e his wife a preference, there is nothing to
ad such knowledge or intention. Apart from
whether her request for the reconveyance
ressure sufficient to justify it, that request,
when the lot was found not to be necessary for
the bonus, is not sufficient to raise against
ion that she had an improper end in view.
ent for creditors was made more than 60 days
the statutory presumption of invalidity does
reconveyance, therefore, I conclude, is neither
referential within the statute.

ird branch of plaintiff's claim, I think the
fails to establish that any of the husband's
to the buildings on the wife's land; $800 is
een borrowed on mortgage; this went into the
nly evidence is that the wife paid the balance
of her own money. The total cost is said to
$900. Part of what she thus expended—
ewn how much—was part of the proceeds of
sold on Front street. I am not satisfied that
e husband's business, but at least she was
hattels therein, covered by the bill of sale of
from him to her, which is not attacked, and
e than cover any small amount from that

will be dismissed, but, in view of the mis-
nts of consideration in the conveyances and
circumstances, it will be without costs.

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MAGEE, J. JANUARY 23RD, 1907.

TRIAL.

PETT v. ATTWOOD.

Bankruptcy and Insolvency—Assignments and Preferences—Assignment by Insolvent Trader for Benefit of Creditors—Claim of Wife of Insolvent to Rank on Estate—Transactions between Husband and Wife—Price of Land Conveyed by Wife—Money Lent—Interest—Costs.

Action by the wife of H. F. G. Pett, an insolvent trader, for a declaration of her right to rank as a creditor upon his estate in the hands of defendant as assignee for the benefit of creditors.

MAGEE, J.:—The first item of plaintiff's claim is $600 for the value of property conveyed by her to her husband on 9th November, 1898. This, it appears from the evidence, is the lot on which the biscuit factory was built, which her husband was carrying on at the time of the assignment. In . . . Attwood v. Pett (ante) I have considered the evidence relating to it, and reached the conclusion that, though the consideration expressed in the deed was love and affection and one dollar, the real understanding between the husband and wife was that she was to be paid for the property, whether in cash or in shares of the joint stock company which he contemplated forming. Both put the value at $600, and there is no evidence to the contrary. I think the wife's claim is well founded. But, as there was no definite time fixed for the payment, and no arrangement for interest, and the wife appears to have assented to his continued endeavour to promote the company, and asserts that she was herself carrying on business on the property, or part of it, till . . . about June, 1903, the second item for interest on the $600 should not be allowed.

The other items of $500 and $400 and $45 are shewn to have been part proceeds of mortgages or sales of the wife's property, and are satisfactorily proved to have been lent to the husband. No time for payment and no arrangement for interest thereon is established, and, considering that both

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years the husband had been bearing all the
nses, I do not think any right to interest can be

ted, or at least established by the husband's
the $500 should be reduced by $200, the con-
e bill of sale to plaintiff of 13th October, 1899.
ce plaintiff's total claim to $1,345, for which
ff will be declared entitled to rank. The date
ale was originally written 11th October, 1899.
the statement of claim in Attwood v. Pett that
e husband gave the wife a mortgage on land
h was subsequently discharged. No reference
the evidence, and I am unable to say whether
e balance of the $500. If defendant desires,
reference as to that, the costs of which and
ons will be reserved.

gs between husband and wife were much in
y by the assignee, and were beclouded by the
nt of consideration in the deed between them,
ould bear her own costs till judgment.

JANUARY 23RD, 1907.

TRIAL.

THOMPSON v. MORRISON.

*d Insolvency—Conveyance of Land by Insol-
ditor—Preference — Statutory Presumption—
ces Rebutting—Absence of Knowledge of In-
d of Fraudulent Intent—Effect of Transaction
of other Creditors.*

behalf of plaintiff and all other creditors of
ifford Morrison and Leslie Morrison to set
ance dated 14th May, 1906, from them to
abelle Paling of a certain lot in the village
fraudulent and void against the creditors of

allen, Wallaceburg, for plaintiff.

arnia, and N. S. Gurd, Sarnia, for defendants.

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MULOCK, C.J.:—The grounds of attack are, that the conveyance was voluntary, and, if not voluntary, was given in satisfaction of a pre-existing debt; that it gave the grantee an unjust preference, and was given with intent to defraud the grantor's creditors.

Mrs. Paling, a widow, is mother-in-law of both her co-defendants, who in 1902 began, in partnership, the erection of a steam flour mill at Sombra, and when completed proceeded to operate it in partnership until its destruction by fire on 19th February, 1906.

The mill property was insured, but, in consequence of the policies having been assigned to various creditors, including plaintiff, the insurance moneys were not available for creditors generally.

Plaintiff's claim has been reduced by $1,000, portion of the insurance moneys paid to him, and the balance now owing to him is $576.22. At the time of the conveyance the debtors' financial position was as follows. Their liabilities in all amounted to $14,360, $1,650 of which was owing to . . . Mrs. Paling. Their assets consisted of the mill site, which plaintiff valued at $80, book debts worth about $100, a couple of village lots . . . worth apparently about $200, and an engine and boiler, both of which had passed through the fire. The engine, having been sold for taxes, realizing but $25.50, was not an asset available for the benefit of the unsecured creditors. No evidence was taken as to the value of the boiler.

As to Mrs. Paling's claim against her co-defendants, the evidence shews that on 15th November, 1902, she lent them in cash $400. . . . In the spring of 1902 she advanced them a further sum of $1,000, . . . On 3rd March, 1904, she advanced them the further sum of $250 on her note. . . . The Morrisons' books of account are very unskilfully kept, but they shew the account of Mrs. Paling and corroborate her testimony. When she lent them the $400 on 15th November, 1902, they gave her their promissory note for the amount, and when, in the following spring, she made a further advance of $1,000, she told Clifford Morrison, who had the custody of the $400 note for her, to cancel this note and give her a new one for $1,400. His method of doing this was somewhat peculiar. He first marked the $400 note as paid, and then made it into a $1,400 note by putting the

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een" after the word "four" in the body of the by adding the figure "1" before "400." I do this clumsy arrangement indicated any fraudulent casual observation of the note itself shews the alter- this period, that is, the spring of 1903, assuming, hat the change in the note was then made, there ng indicating any approaching financial disaster. ties were endeavouring to create evidence to support claim, they would hardly have resorted to such an method.

aling gave her evidence in a perfectly straightfor- ner, and impressed me as being an honest witness, ept her testimony, and find that at the time of the her co-defendants were honestly indebted to her m of $1,650. . . . They evidently withheld any knowledge of the true state of their affairs. ome time previous to the conveyance she spoke to ons with reference to their paying her, but appar- in no way solicitous on the point. Clifford asked would take the property in settlement of her claim em, and she said she would, and this was done. has accepted a property worth, in the opinion of bout $80, in satisfaction of a debt of $1,650. The on in the deed is $1,500, but the conveyance satis- of $1,650.

rit of summons in this action was issued on 14th 2, being within 60 days of the impeached trans- thus the onus is on Mrs. Paling to rebut the pre- f fraud: R. S. O. 1897 ch. 147, sec. 2, sub-secs. 3, 4.

he contention that the effect . . . is to give g an unjust preference, it would seem at most, ac- plaintiff's evidence, that she obtained property $80 . . . and thus . . . satisfied a claim being more than one-third of the debtors' liabili- g a balance of liabilities amounting to about $2,700 worth about $300. . . . This transaction does to me to have prejudiced the remaining creditors. rawal from the general assets of property worth and the wiping out at the same time of a claim of ves the remaining creditors, I think, in a better an if the transaction had not taken place. It was opinion, an unjust preference, nor did it prejudice

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the other creditors. On this ground alone plaintiff's action fails.

Further, I am of opinion that the transaction was entered into and carried out by Mrs. Paling in perfect good faith and without any reason to know or believe that her co-defendants were at the time in insolvent circumstances. . . . From all the circumstances of the case I draw the inferences that she did not know and had no reason to believe that her co-defendants were insolvent; that she had no intent that she should be preferred over other creditors, or that they should be prejudiced, but that the transaction was entered into in perfect good faith on her part. The onus cast upon her has been discharged. . . . See Molsons Bank v. Halter, 20 S. C. R. 88, Gibbons v. McDonald, 20 S. C. R. 588, and Benallack v. Bank of British North America, 36 S. C. R. 129, which shew that to succeed in a transaction like the present fraudulent intent on the part of the grantee must be established. This plaintiff has failed in doing, and the action should be dismissed with costs.

JANUARY 23RD, 1906.

DIVISIONAL COURT.

MECHEFESKE v. ROBERT STEWART LIMITED.

Contract—Timber—Woodmen's Liens—Undertaking to Pay Amounts of, if Established—Construction—New Trial.

Appeal by plaintiffs from judgment of MAGEE, J., at the trial, dismissing the action, which was brought to recover the balance alleged to be due to plaintiffs under an undertaking given by defendants, when removing certain lumber sold to them by one Butterfield, upon which plaintiffs asserted woodmen's liens, to pay the amounts of the liens if they should be held good.

J. McCurry, North Bay, for plaintiffs.

C. L. Dunbar, Guelph, for defendants.

The Judgment of the Court (FALCONBRIDGE, C.J., BRITTON, J., RIDDELL, J.), was delivered by

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. J.:—The letters which were supposed to be put not actually filed at the trial, make it clear that dge is right in his interpretation of the letter sued undertaking must be read as though it were: ndertake on behalf of our clients that if the liens nts are held good as against our clients, we will unt of them." The words admit of such a con- nd it is plain that both parties so meant. It is t, then, for plaintiffs to prove, if they have proved, ve established in the District Court and the Divi- heir liens as against Butterfield.

y had done work which entitled them to a lien as ndants was rather indicated than proved at the no doubt, was due to plaintiffs having miscon- rights. Upon the case as it comes before us, the ppealed from is right, but I think justice will be ering a new trial—the costs of the former trial appeal to be costs to defendants in any event. e already taken will stand as part of the evidence w trial; either party to be at liberty to supple- e may be advised.

se where a reasonable settlement should be made.

JANUARY 23RD, 1906.

DIVISIONAL COURT.

AN v. GREENOCK SCHOOL TRUSTEES.

ols — Change in School Site — Expenditure of Special Meeting of Ratepayers—Taking Poll— Farmers' Sons to Vote—Public Schools Act— on—Motion for Judgment.

y plaintiff from judgment of MAGEE, J., 8 O. W. a motion for an interim injunction, turned into judgment, dismissing the action with costs.

ilmer, for plaintiff.

lcolmson, Lucknow, for defendants.

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THE COURT (FALCONBRIDGE, C.J., BRITTON, J., RIDDELL, J.), dismissed the appeal with costs.

MULOCK, C.J. JANUARY 24TH, 1907.

TRIAL.

FAIRBANKS v. SAUNDERS.

Chose in Action—Assignment of—Claim against Estate—Notice to Executors—Judgment Debtor—Unjust Preference—Attachment of Same Fund by Judgment Creditor—Issue as to Validity of Assignment—Assignment of Portion of Fund.

Issue in respect of certain moneys attached in the hands of the executors of one Richard Bradley, by Fairbanks, the judgment creditor, and claimed by one Recor.

F. F. Pardee, Sarnia, for claimant.

I. Grenizen, Petrolia, for judgment creditor.

MULOCK, C.J.:—About 5 years ago the claimant, E. C. Recor, at the request of James Saunders, the judgment debtor, indorsed his note for $2,800, and this note became the property of the Commercial Savings Co. of St. Clair, Michigan, and was renewed from time to time, Recor indorsing each renewal, until July, 1906, when he paid the note then due and became and now is the holder thereof, and there is owing upon it $2,832.

Saunders, as executor of one Richard Bradley, was entitled to certain moneys out of the estate, and instituted proceedings to recover the amount. Recor pressed Saunders to assign his claim to this money as security for the note, and upon 15th September, 1903, Saunders in writing assigned to Recor part of this claim, namely, $1,600, and an additional amount equal to any amount which Recor might advance for the payment of interest on the note. Recor advanced $452

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such interest, and his claim, I find, amounts

ne, 1906, Saunders's claim against the estate
$2,000 and costs.

ut 30th July, 1903, Fairbanks, the judgment
ned judgment for $903.66 against Saunders,
n, and placed it in the hands of the sheriff of
re it has ever since remained and been kept
live. On 16th August, 1906, Fairbanks ob-
hing order in respect of the fund in question.
1906, the executors of Bradley received from
f the assignment from Saunders to him, and
tween the parties is whether Recor, the claim-
nks, the judgment creditor, is entitled to the
ands of the executors. . . .

al indebtedness of Saunders, now represented
note, grew out of a purchase by Saunders of
which he pledged with Recor as security for the
edness of $2,800. In time the security de-
lue, and Recor called for additional security.
of the existence of Saunders's claim against the
and asked to have it assigned as additional
nders's claim was for services as executor. By
vill he was to be paid an annual sum, and in
or's request for an assignment of the Bradley
s promised that when it had accumulated to a
he would accede to Recor's request. About
assignment in question, Recor, who resides in
e to Sarnia and met Saunders in Mr. Gurd's
n Saunders then definitely promised Recor se-
laim. The assignment bears date 15th Sep-
nd was executed by Saunders in Port Huron,
to Recor. . . . Apparently the reason for
en to the executors . . . earlier notice of
was that the claim was in litigation, and so
the settlement of a suit in June, 1906, but
otice the assignment was a good transfer as
rties, and it not having been attacked until the
aching order of 16th August, 1906, the onus is
nent creditor to establish its invalidity.

ded that the assignment was made in order to
unjust preference over Saunders's other credi-

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tors—was made with intent to defraud—and should be declared void. . . .

There is no evidence to warrant me in drawing the inference that at the time of the assignment Recor knew, or had reason to believe, that Saunders was insolvent, or that in obtaining the assignment Recor had any intent of obtaining an unjust preference or of defrauding Saunders's creditors. The transaction appears to have been an honest one. The onus was on the judgment creditor to establish its invalidity, and this he has failed to do.

Counsel for the judgment creditor argued that the assignment was not an absolute assignment within the meaning of sec. 58 of the Judicature Act, and that in consequence the judgment creditor was entitled to the fund. Even if the assignment did not come within this section, it would not follow that the judgment creditor would be entitled, as against the claimant, to the fund. This is not an action by Recor, as assignee of the fund, to recover payment from the executors. If it were, it would be open to them to raise the objection that Recor's assignment was not one within the meaning of sec. 58, and such an objection, in such an action, would doubtless have weight, for the assignment does not purport to assign the whole claim against them. But the issue here is of a different nature, the question being simply whether the judgment creditor or the claimant is entitled to the fund. The assignment purported to assign to Recor a portion of the fund. The circumstance that, as a result of the settlement of the action, the fund is less than the amount to which Recor is entitled, does not alter the legal construction to be placed upon the assignment itself, and it still must be construed as but an assignment of a portion of the fund. To that extent it transfers to Recor the debtor's interest in the fund, and the execution creditor's interest therein can be no greater than that of the debtor, and I therefore find that, as against the judgment creditor, at the time of the service of the attaching order upon the garnishees, Recor was entitled to the moneys in their hands to the extent of $2,032. The claimant is entitled to his costs as against the execution creditor.

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MASTER. JANUARY 25TH, 1907.

CHAMBERS.

STONE v. DAVIES.

mination of Plaintiff—Issue of Appointment Service of Statement of Defence—Service of f Defence on same Day—Fraction of Day—urt.

efendant under Rule 454 to dismiss the action efault in attendance for examination for dis- to an appointment and subpœna served.

or defendant.

ston, for plaintiff.

R:—Defendant's solicitor at 2 p.m. on 16th t filed his statement of defence, and immedi- s issued a subpœna and obtained an appoint- amination of plaintiff for discovery. Between e first served plaintiff with the appointment nd paid the necessary conduct money, and rds served plaintiff's solicitor with the state- e and appointment. On the return of the ap- ntiff's solicitor attended, but refused to pro- on the ground that the appointment had been d on plaintiff before the delivery of the state- e had been completed by service on his solici-

fines delivery of a pleading as including filing

ys: "The examination on the part of a de- ke place at any time after such defendant has atement of defence."

ys: "Where a party is entitled to examine or person, he may procure an appointment the proper officer.

itted that the position taken by plaintiff was e to defeat defendant's manœuvre to have the plaintiff taken before his own. This posi-

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tion was supported by reference to McMurray v. Grand Trunk R. W. Co., 3 Ch. Ch. 133, and Stovel v. Coles, ib. 362. Defendant relied on Broderick v. Broatch, 12 P. R. 561, and this was met by plaintiff by McIlroy v. McIlroy, 14 P. R. 264 followed in Hermann v. Mandarin Gold Mining Co., 18 P. R. 34. These last 3 cases were as to the regularity of notice of trial given in fact before filing or service of statement of defence. . . . In the first case the notice was held regular because the defendant was in default. In the other two it was set aside, as there was no default. In both of these the earlier case was distinguished, if not doubted. But if in point it cannot be considered overruled, as was pointed out in Cruso v. Bond, 9 P. R. 111 and 1 O. R. 384.

On the facts, I think the motion should be allowed, for the reasons given in Broderick v. Broatch, supra, as to the rule that the Court will not regard the fraction of a day in such cases as the present. Here the whole of the proceedings took place within a period of two hours. . . .

Plaintiff's argument is certainly one strictissimi juris, and his case must be clearly made out beyond all question. In this view it is important to notice the difference in the wording of Rule 530, "after the close of the pleadings either party may give notice of trial," compared with that of Rule 442, "the examination on the part of a defendant may take place at any time after such defendant has delivered his statement of defence." This was not contravened by what was done. But it was argued that the opening words of Rule 443, "where a party is entitled to examine," etc., must be taken to mean that until he has complied with the requirements of Rule 442 he cannot take any step necessary for the examination. It is not necessary to decide this; if it were, I should struggle against such an interpretation, in view of the almost universal practice to the contrary.

However it might be necessary to decide if an appointment were taken out before the day of filing and serving the statement of defence—under the facts of this case I cannot hold that there was any irregularity. It is not said that an appointment is to issue when the statement of defence has been delivered, but only that an examination may take place thereafter.

It can scarcely be that after a quarter of a century of the Judicature Act such an objection can prevail, under the ad-

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this case. But the point was at least argu-
ll be of service to have it settled, so that the
tion will be in the cause, but plaintiff should
mination, having already received sufficient
.

JANUARY 25TH, 1907.

TRIAL.

ES v. TOWN OF BRIDGEBURG.

orations—Drainage—Surface Water—Sewers
Cellar — Negligence—Construction of Side-
lity—Act of God—Extraordinary Rain-fall.

flooding the premises of plaintiff, a merchant
siness in the town of Bridgeburg.

, Welland, for plaintiff.

ond, Welland, and H. E. Rose, for defendants.

.J.:—Plaintiff's store is situate on the south-
Jarvis and Gzowski streets, which intersect
ight angles.

ust, 1905, an unusually heavy rain-storm oc-
water filled plaintiff's cellar, damaging, it is
tored there. It was agreed that if defendants
ere should be a reference to determine the
ages. . . .

t runs east and west, its highest point being
west of Gzowski street. The surface water
originally flowed easterly in two open ditches,
th and the other on the south side of Jarvis
reached Gzowski street, which it crossed
inch drains, and thence found its way to the
wo 8-inch drains proved insufficient, and in
ch drains were substituted for them, but 4
e did not establish their sufficiency. In 1904
a sewer in the centre of Jarvis street, com-
distance west of Gzowski street, and extending

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to a point several hundred feet east of Gzowski street, and, in order to enable the surface water from Jarvis street to enter this sewer, it was constructed with a man-hole in the centre of the square formed by the intersection of the two streets, and from this man-hole were constructed two drains, each terminating in a catch-basin, and running one in a north-westerly direction towards the north-west corner, and the other in a south-westerly direction towards the south-west corner, of Jarvis and Gzowski streets. About the same time the town built a concrete sidewalk from the north to the south side of Jarvis street along the west side of Gzowski street. This sidewalk was on a straight grade from the north to the south side of Jarvis street, and at the north end was 610 feet 5 inches, and at the south end 610 feet 3 inches above the sea level.

In order to allow the water flowing east along Jarvis street to reach these two catch-basins, it was necessary for it to pass under or over this sidewalk, and the arrangement provided for that purpose consisted of two 6-inch drains laid underneath this sidewalk and connected with the catch-basins, which were situated at the east side of the sidewalk. The south 6-inch drain was washed away, leaving an opening of an area equal to twice that of the 6-inch circle.

Immediately in front of plaintiff's store was a concrete sidewalk 610 feet 3 inches above sea level. . . . This piece of walk only extended in front of plaintiff's store. Immediately west of it was a board sidewalk which for 100 feet was 2 or 3 inches lower than the cement walk to the east of it, and there is nothing to shew that this walk was other than an ordinary board walk, under which, in all probability, water could readily find its way from Jarvis street to the land on the south. On the west side of plaintiff's store were 3 cellar areas, the 2 northerly ones each 610 feet above sea level. On the west side of plaintiff's store the land sloped from the west towards the store, but plaintiff had an open drain made on the west side of his store to intercept water flowing from the land towards the building, and to lead it under the sidewalk into Jarvis street, which plaintiff had a right to do.

On 6th August, 1905, Bridgeburg was visited by an unusually severe rain-storm. The water ran easterly along Jarvis street until it reached the 6-inch drains, but not being able to escape fast enough rose in the street until it over-

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len and also the concrete sidewalk on the south
l plaintiff's land and ran into his cellar through
rn areas on the west side, and filled his cellar,
amage caused by this flooding this action is

ce establishes the fact that the penning back of
Jarvis street was caused by the concrete side-
mpletely crossed the street, and was not sup-
nings sufficiently large to allow the water to
. . .

system was designed by Mr. J. H. Jackson,
he witnesses for defendants, and he stated at
the means provided by defendants for taking
ss Gzowski street were improper. He stated
f depending upon openings under the sidewalk,
self should have been sufficiently depressed at
south sides to have afforded uninterrupted
surface water. Instead of such construction,
cted a solid wall, which held back the water
wed on plaintiff's land and flooded his cellar.
that if the sidewalk had been constructed as
aid it should have been, the water could not
he street above the sidewalk on the south side
lowed into plaintiff's premises. . . .

vn that on many occasions Bridgeburg experi-
in-storms—the one in question, however, hav-
bly an especially severe one. But that circum-
I think, relieve defendants from liability if
ed in their duty, and if such failure in all
ised the flooding. The statutory right of a
oration to construct and maintain drains car-
e duty to use due care in the exercise of such
which, and such negligence causing injury, the
nnot take shelter behind the Act: Mayor,
f Hawthorn v. Kannulinck, [1906] A. C. 105.
oration had from experience learned that two
were not sufficient to carry off the water which
arvis street, and for that reason in 1900 substi-
n two 12-inch drains. . . . These latter
r 4 years, and did not on all occasions meet
uirements, but during this period, so far as
was nothing to prevent water which could not

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escape through the 12-inch drains running off easterly over the surface of the street. Then defendants constructed across Jarvis street the concrete sidewalk already mentioned, providing in it two 6-inch drains, and thus it became impossible for any water to escape except such as could find its way through the two 6-inch drains. . . .

The corporation made these changes without competent advice as to their sufficiency to meet the requirements of the situation, and, so far as appears, without even considering that phase of the matter, and knowing from experience that 8-inch drains were too small. Under these circumstances, they have failed in their duty to exercise their statutory powers with due care, and are liable to damages resulting from such negligence. It was proved that if the 12-inch drains had been in order, they would have carried off the water, but they were blocked up.

Defendants, having been guilty of negligence, are not entitled to be relieved of liability merely upon shewing that the rain-fall was abnormally great, but must also prove that the damage complained of happened irrespective of their neglect: Mackenzie v. Township of West Flamborough, 26 A. R. 198. This they did not do.

It was sought to be shewn at the trial that the flooding of plaintiff's cellar was caused by surface water which had fallen on his own land. Even if this were established, defendants would not thereby be relieved if their negligence prevented the water escaping, and thus caused it to back up and flood the cellar. It was shewn that on the west side of plaintiff's store was an open ditch, which, with defendants' consent, led the water from plaintiff's land into Jarvis street, defendants themselves constructing the drain under the sidewalk to carry this water into their open ditch. It was defendants' negligence that prevented this and other water on Jarvis street escaping without damage to plaintiff.

On the facts I find that the flooding was caused by defendants' negligence, and that they are liable for the damage sustained by plaintiff, and I direct a reference to the Master at Welland to ascertain the amount. Further directions and costs reserved. Plaintiff is entitled to costs up to the trial but the scale thereof may be affected by the Master's finding and therefore they are reserved.

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JANUARY 25TH, 1907.

DIVISIONAL COURT.

R v. BORLAND CARRIAGE CO.

ription for Stock—Promissory Note Given Misrepresentation — Condition—Absence of cceptance of Plaintiff as Shareholder—Es-ery on Note.

ntiff from judgment of ANGLIN, J., 8 O. W. g action for delivery up and cancellation of given by plaintiff in payment for stock in ny, and in favour of defendants upon their ecover the amount of the note.

n, Stratford, for plaintiff.

Stratford, for defendants.

FALCONBRIDGE, C.J., TEETZEL, J., RIDDELL, appeal with costs.

JANUARY 25TH, 1907.

DIVISIONAL COURT.

CK MANUFACTURING CO.

rcourses—Logs Floated over Stream—Tolls Order Fixing—Past Tolls—Mandamus.

Beck Manufacturing Co. from order of 9, dismissing motion for a mandamus.

for appellants.

rence, for the Ontario Lumber Co.

FALCONBRIDGE, C.J., TEETZEL, J., RIDDELL, appeal with costs, giving leave to the ap- to the Court of Appeal, if so advised.

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JANUARY 25TH, 1907.

DIVISIONAL COURT.

BAXTER v. GORDON IRONSIDES AND FARES CO.

Malicious Prosecution — Proof of Favourable Termination of Criminal Proceedings—Release as a Result of Compromise or Settlement.

Appeal by defendants from judgment of BOYD, C., at the trial, in favour of plaintiff, upon the findings of a jury, for the recovery of $500 damages in an action for malicious prosecution.

H. L. Drayton, for defendants.

W. E. Middleton, for plaintiff.

The judgment of the Court (MULOCK, C.J., TEETZEL, J., ANGLIN, J.), was delivered by

ANGLIN J.:—. . . Plaintiff was indebted to defendant company, of which defendant Brown was the agent at Fort William. Under circumstances which the jury have found did not afford reasonable and probable cause for belief in plaintiff's guilt, defendant Brown laid an information against plaintiff charging him with concealing and disposing of his property with intent to defraud his creditors: Criminal Code, sec. 368. After plaintiff had been taken into custody, apparently upon a suggestion of the District Crown Attorney that the matter should be settled, an arrangement was made between plaintiff and defendant Brown by which, upon the latter receiving $300, part of the sum of $336 found upon the person of plaintiff when arrested, and 3 promissory notes of plaintiff for $255, the balance of the indebtedness of plaintiff to defendant company, defendant Brown consented to forego further prosecution of plaintiff upon the criminal charge. Under this agreement defendant Brown and plaintiff came before the magistrate, and upon Brown receiving the $300 in money and the three promissory notes signed by plaintiff, the magistrate indorsed upon the information the words "settled out of Court"

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magistrate's) signature—and plaintiff was al-

state of facts, defendants contend that plain-
ntain an action for malicious prosecution, be-
o shew a termination of the criminal proceed-
to himself. Plaintiff relies upon the disposi-
the proceeding in the police court by the
his consequent release from custody, as suffi-
a termination in his favour to give him a
ntain this action.

on ground that the criminal proceedings must
hey have been, in this case, terminated. It
defendants that the abandonment of a pro-
e complainant or the entry of a nolle prosequi
entative of the Crown—if not the result of
nise or arrangement with the accused—is a
f the criminal proceeding in favour of the
hrist v. Gardner, 12 N. S. W. Rep. 184; Pierce
& Ad. 399. But upon the question whether
nolle prosequi or an abandonment, brought
promise or settlement with the accused or by
nt, is such a determination, the parties are at

to Morgan v. Hughes, 2 T. R. 225; Wilkinson
o. & M. 495, 496, per Lord Tenterden; God-
, 6 Mod. 262; Castrique v. Behrens, 3 E. & E.
ath v. North Eastern R. W. Co., 11 Q. B. D.
t v. Clark, 18 O. R. 602, 604; Redway v. Mc-
. 9 Q. B. 74; Taylor v. Ford, 29 L. T. 392;
emer, 9 O. L. R. 69, 4 O. W. R. 540.]

lish or Canadian case do I find anything which
pon the soundness of Lord Tenterden's view
must shew such a termination of the pro-
n against him as furnishes "prima facie evi-
e action was without foundation."

sence of direct English or Canadian authority
ct upon his right to maintain suit for malici-
on of the dropping of the original proceedings
ne of a compromise or arrangement with the
fer to some American authorities where this
s been considered. . . .

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[Reference to Emery v. Ginnan, 24 App. Div. (N.Y 65; Rosenberg v. Hart, 33 App. Div. (N.Y.) 262, 26 Langford v. Boston and Albany R. R. Co., 144 Mass. 43 Brown v. Randall, 36 Conn. 56; Russell v. Morgan, 24 R. 134; Parker v. Farley, 10 Cush. 279; Atwood v. Beirne, 8 N.Y. 547; Gallagher v. Stoddard, 54 N.Y. 101; McCormic v. Sisson, 7 Cowen 715; Loftus v. Meyer, 84 N.Y. Supp. 86 Craig v. Ginn, 94 Am. St. Rep. 77.]

Having regard to the fact that the action for malicio prosecution, even where a case of civil process is the subje of complaint (Goslin v. Wilcock, 2 Wils. 302, 307), is n to be favoured—and a fortiori this should be so on groun of public policy where it is sought to mulct a citizen in dan ages for having put the criminal law in motion (Parker Farley, 10 Cush. 279, 281)—we would, I think, establish most dangerous and undesirable precedent were we to acce to the contention that upon any termination of crimin proceedings other than actual conviction, no matter by wh means or in what manner procured, the accused may at on launch an action for malicious prosecution. The gre weight of American authority is opposed to this propositio English and Canadian authority support the view that th plaintiff must shew not only a termination of the allege malicious prosecution, but a termination in his favour. I my opinion, mere release as a result of compromise or agre ment is not such a favourable termination.

It is unnecessary, in the view which I have taken upo this ground of appeal, to consider the further questio raised, namely, that the defendant company could not b held liable for the prosecution of the plaintiff instituted b Mr. Brown without instructions.

The appeal of defendants will be allowed with costs, an the judgment in favour of plaintiff set aside and judgme entered for defendants dismissing this action with cost and in favour of defendant company for $255 upon the counterclaim, also with costs. The latter item was omitte by inadvertence from the judgment at the trial, and th error is now rectified by consent.

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JANUARY 25TH, 1907.

DIVISIONAL COURT.

RE PORTER.

Will—Construction—Restraint on Alienation—Part Restriction—Validity—Lifetime of Devisee in Fee.

Appeal by Hugh Porter the younger from order of BRITTON, J., in Chambers, 8 O. W. R. 588, declaring valid the restraint contained in the following clause of the will of the late Hugh Porter the elder:—

"I give, devise, and bequeath lot number 13 in the 10th concession of the township of Grey, in the county of Huron, to my son Hugh Porter, his heirs and assigns, to have and to hold to said Hugh Porter, his heirs and assigns, for his and their sole and only use forever, subject to the condition that the said Hugh Porter shall not during his lifetime either mortgage or sell the said lot thus devised to him."

J. H. Spence, for appellant.

F. W. Harcourt, for infants.

The judgment of the Court (MULOCK, C.J., TEETZEL, J., ANGLIN, J.), was delivered by

TEETZEL, J.:—In Re Martin and Dagneau, 11 O. L. R. 349, 7 O. W. R. 191, Magee, J., very fully discussed the English and Canadian authorities bearing on the question of restraints imposed by testators upon the alienation of lands devised in fee simple, and, as I fully agree with his conclusion and in its application to this case, a further review of the authorities is quite unnecessary for the purpose of this judgment.

The distinction in many of the cases is very finely drawn, and it is difficult, if not impossible, to reconcile them or to reduce them to any common principle. Suffice it to say that since the judgment of Sir George Jessel in In re Macleay, L. R. 20 Eq. 186, the Courts of this province, beginning with Earls v. MacAlpine, 6 A. R. 145, have consistently adopted the view that you may restrict alienation by prohibiting a particular class of alienation. The cases are all cited in Re Martin and Dagneau, supra. . . .

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[Reference to In re Rosher, 26 Ch. D. 801; article in 2 Sol. J. 559; Blackburn v. McCallum, 33 S. C. R. 65; Gill v. Pearson, 6 East 173.]

In Blackburn v. McCallum, 33 S. C. R. 65 . . Davie J., at p. 81, says: " . . . It seems to me that a tim limitation is necessary in any case where restrictions upo alienations are attempted to be imposed upon a fee simpl devise, even with respect to a class of persons; otherwise th devise might be bad as contravening the rule against pe petuities."

This is the first expression of opinion that I have foun requiring a time limitation to be imposed in order to mak valid a partial restriction, either as to the class of alienatio or as to the individuals prohibited.

It is not necessary in this case to consider how far thi expression of opinion was necessary for the decision of th point then before the Court, because there is in the will i question here a specific limitation both as to the characte of alienation and as to the time within which such aliena tion shall not be made. The will forbids alienatio by "mortgage or sale" only during the lifetime of th devisee, and does not restrain alienation by will, lease, o other manner, except by "a mortgage or sale," and the judg ment appealed from is, therefore, not only fully supporte by the decisions in the Ontario Courts, but is within th above opinion of Davies, J., on the subject.

Appeal dismissed with costs.

JANUARY 25TH, 190

DIVISIONAL COURT.

BRENNER v. TORONTO R. W. CO.

Negligence — Street Railway — Injury to Person Crossin Track—Admitted Contributory Negligence — Motorma Perceiving Danger and Endeavouring to Avoid Injury— Inability to Do so by Reason of Previous Neglect to R duce Speed—"Crossing"—Ultimate Negligence—Rule Street Railway Company — Misdirection — Substanti Wrong or Miscarriage—New Trial—Costs.

Motion by plaintiffs to set aside judgment of MAGEE, J upon the findings of a jury, in favour of defendants, and fo

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of an action to recover damages for personal in-
ned by plaintiff Eva Brenner owing to the negli-
fendants as alleged, and for expenses, etc., in-
er father and co-plaintiff in consequence of her

ion was heard by MULOCK, C.J., ANGLIN, J.,

nyth, for plaintiffs.

tt, K.C., and D. L. McCarthy, for defendants.

J.:—About 9 o'clock in the evening of 9th July,
ff Eva Brenner, a Russian Jewess, aged 18 years,
he tracks of defendants in Queen street, opposite
venue, in the city of Toronto, was run down by
l street car. She lost both her left arm and left

finding for defendants, the jury assessed the
tingently—to the girl $5,000 and to her father

er findings were as follows:—

defendants or their motorman guilty of negli-
resulted in injury to plaintiff Eva Brenner?

wherein did such negligence consist? (not an-

plaintiff Eva Brenner by the exercise of reason-
e avoided the injury? A. Yes.

wherein did she fail to exercise reasonable care?
cting to take proper precautions necessary in
road.

failed to exercise reasonable care, did the motor-
exercise reasonable care to avoid injury to her?

wherein did he fail to exercise reasonable care?
ee wherein he failed.

ng of contributory negligence is not challenged
They concede that there was evidence to sup-
hey take no exception to the Judge's charge upon
of the case. It is therefore apparent that, even

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should we be of opinion that the attack made upon the finding of absence of primary negligence on the part of defendants is well founded, we could not upon that ground afford relief to plaintiffs. This renders it unnecessary to consider alleged misdirection in regard to the question of excessive speed, or want of control on the part of the motorman, as bearing upon the question of such primary negligence.

Since the House of Lords decided Radley v. London and North Western R. W. Co., 1 App. Cas. 754, it must, in our Courts, be deemed an incontrovertible proposition that, notwithstanding proven contributory negligence of the plaintiff, "if the defendant could in the result, by the exercise of ordinary care and diligence, have avoided the mischief which happened, the plaintiff's negligence will not excuse him" (defendant). As a convenient and concise term to express negligence of this description, I shall call it "ultimate negligence."

A finding of contributory negligence, involving the proposition that the plaintiff's negligence was proximate and efficient in its character, is logically no more incompatible with or exclusive of a finding of "ultimate" negligence on the part of the defendants than is the finding of primary negligence of the defendants, which likewise involves the proposition that such primary negligence was a proximate and efficient cause, incompatible with or exclusive of a finding of contributory negligence on the part of the plaintiff: Brown v. London Street R. W. Co., 2 O. L. R. 52, 31 S. C. R. 642.

Plaintiffs make a very serious attack upon the charge of the trial Judge as it affected the question of "ultimate" negligence on the part of defendants.

Eva Brenner was crossing Queen street in a north-westerly direction. She had almost cleared the west-bound car when she was struck by the north-western corner of its fender. Had another moment been allowed her, she would have escaped injury. Could defendants, by the exercise of ordinary and reasonable care, have afforded her that additional moment? If they could, they might in the result have avoided the mischief, and her negligence in crossing should not excuse them. The jury have in effect found that they could not. Unless that finding should be set aside, this appeal necessarily fails.

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of their charge of ultimate negligence against laintiffs urge 5 things:—1st. That the gong led. 2nd. That the fender was improperly ad- too high from the ground at one corner. 3rd. e girl's danger became apparent the motorman is car under "the reverse." 4th. That but for peed of the car the motorman's efforts to avoid the girl would have been successful. 5th. That otorman's failure to throw off the power pro- at a proper distance east of University street, n of the car would have been so reduced that he oided the injury to the plaintiff.

4 grounds of negligence were set up in the 5th ground was not specifically alleged. The rounds were fairly left to the jury, and their ust be taken to mean that the gong was sounded throwing off of the reverse was not negligent, egligent, then that the mischief would not have l had the reverse not been thrown off. In either are concluded as to these points by the finding.

e's reference to the evidence as to the condition may not at one point have been quite accurate, f the fact that the girl did not pass under the as thrown off by it to the north, a jury should o find that improper adjustment of the fender schief, or that it would have been prevented r hung nearer to the ground.

question of excessive speed (excluding for the earing upon that issue of the want of proper d in the 5th ground) the conflicting evidence sented to the jury. Any omission by the Judge attention of the jury to the bearing upon this e fact that after striking plaintiff the car ran distance before it was stopped, and any mis- which his remarks upon the motorman's ex- hat fact might have occasioned, were fully and cured when the jury was re-called and specifi- as to this portion of the evidence and its bearing on of speed. In regard to this 4th ground, ept in so far as it is involved in or involves the plaintiffs have no cause for complaint.

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The 5th ground, of alleged "ultimate" negligence, rests upon the following evidence. Defendants' rule No. 58, for the guidance of motormen, is in these terms:—"Curves and crossings. In approaching crossings and crowded places where there is a possibility of accident, the speed must be reduced, and the car got carefully under control."

James Whitehead, a witness called for the defence, who describes himself as an instructor of motormen, when dealing with this rule says that motormen are supposed to shut off power in approaching all cross streets—if running 6 miles an hour, at a distance of 60, 80, or 100 feet away from the street crossings—at 10 miles an hour, 20 or 30 feet sooner—and at 15 miles an hour, "20 to 30 feet farther back still." This witness further says that in approaching the corner of University street, having had full power on after leaving York street, as a competent man he would shut off his power 40 or 50 feet before reaching the corner of University street. There is strong evidence that the speed was not less than 6 miles an hour. Lewis, the motorman who had charge of the car in question, says, first, that he ran with power on until he reached University street; and, later, that he did not throw the power off until opposite the bicycle path which runs down the east side of University avenue. In other words, instead of throwing off his power 40 or 50 feet east of University street, he kept on the power while passing that street and until he had reached the east limit of University avenue, 87 feet west of the east side of University street. If he should have thrown off the power 40 feet east of University street—or of the south-west corner of the Osgoode Hall grounds—he kept his power on, according to his own evidence, for at least 127 feet after it should have been shut off. Had the power been off while the car travelled this 127 feet, its momentum must have been materially lessened, and it seems impossible to say that if, with the greater momentum, the use of the emergency appliances after the motorman realized the girl's danger so nearly enabled him to save her, a jury might not reasonably find that with a reduced momentum the motorman could have avoided the mischief. If, when the emergency arose, the motorman did everything then in his power to permit the unfortunate girl to escape, and if the maintenance of the higher momentum at the moment of the emergency might be ascribed to the

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shut off the power at the proper point, a jury might ude that by that omission the motorman had put his power to prevent the occurrence by the use of at his command, which would otherwise have ective.

this state of facts two questions must be answered. the question which arises upon the evidence above l fairly presented for the consideration of the jury?

l, assuming that the degree of momentum which man found himself unable to overcome should be o his failure to shut off power at an earlier point nd that such omission should be deemed negligence, omission, which occurred before plaintiff's danger l itself, though its operation and effect continued very moment of the injury, be deemed negligence ders defendants liable, notwithstanding plaintiff's ry negligence, because in the result the former t for this continuing though anterior negligence, led the mischief?

he duty of care which defendants owe to persons streets of the city depends upon common law or obligation, and not upon rules promulgated by for the government of their employees, may be iomatic. But that such rules when they concern gement of cars in matters affecting the safety of ing the streets, afford evidence, as against defend- standard of reasonableness in regard to the subjects them, which should not be withdrawn from the ion of a jury, is also well established: Preston v. . W. Co., 11 O. L. R. 56, 59, 6 O. W. R. 786, 8 O. W. Except, perhaps, as affecting the weight which a ld attach to them, it matters little in what form are communicated to the employees—whether in riting, or as oral directions given by an instructor. evidence here of a rule or direction regarding the of speed, the control of the car, and the shutting ver, which the motorman Lewis did not observe. ot reduce the speed of his car when approaching ng; neither did he shut off his power.

el for defendants argued that this rule or direction apply to the case where an approaching street ter- t the street upon which the car is running. . . .

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[University street and University avenue are not prolonged south of Queen street.]

I find the following definitions of "crossing:" in the Century dictionary, "the place at which a road is or may be crossed or passed over;" in the Standard dictionary, "the place where a roadway may be crossed, as a street crossing;" and in Murray's dictionary, "the place at which a street is crossed by passengers." That the foot of University street is a place at which Queen street may be and is crossed by passengers and vehicles admits of no question. The use of the term "intersection" elsewhere in the rules of defendants also indicates the wider meaning as that intended to be given to the word "crossings" employed in the rule now under consideration. See Williams v. Richards, 3 C. & K. 81.

Was this rule or direction in regard to throwing off power when approaching crossings properly submitted to the jury as evidence of what should be deemed reasonable care, or was that evidence practically and in effect withdrawn from their consideration? . . .

I am unable to see how the jury could have taken from what was said to them aught else than that they must disregard the testimony as to defendants' rules and directions to motormen, not only as creating a duty to the public, but also as affording any evidence of what is reasonable care in the running of a car. . . . If such be the fair effect of this portion of the charge, it was, in my opinion, misleading, and amounted to a withdrawal from the jury of evidence which they should have been at least permitted, if not directed, to consider. . . . In considering the question of speed at this point the jury were in effect told to deal with it regardless of the rule for reduction of speed and the direction that power should be shut off. The instruction to the jury that they should pass upon the reasonableness of speed, therefore, did not, in my opinion, at all counteract the effect of the withdrawal from their consideration of the evidence as to the rules and directions of the company.

It seems impossible to say that this misdirection may not have had a serious effect upon the opinion of the jury, not merely upon the question of primary negligence, which may in the present case be unimportant, but also upon the question of ultimate negligence on the part of defendants: Bray v. Ford, [1896] A. C. 44. Misdirection being shewn, the party

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the verdict must, notwithstanding Rule 785, shew isdirection did not affect the result: Anthony v. 37 L. T. N. S. 433. The jury might, upon the ave found that, but for the motorman's failure hut off power, or to reduce speed, the momentum would have been so lessened that he could, with ncy appliances at his command, have avoided run- the plaintiff; and they might also have found, if consider the rule as to reducing speed and control truction as to shutting off power when approaching hat such failure to shut off power and to reduce negligence.

uld this be "ultimate" negligence within the the rule holding a defendant liable, notwithstand- utory negligence of the plaintiff, if in the result fendant) could by the exercise of ordinary care d the mischief? This question has been the sub- h keen discussion. . . .

nce to Davies v. Mann, 10 M. & W. 546; Radley and North Western R. W. Co., 1 App. Cas. 754; Law of Negligence (1901), secs. 230, 232, 237; Contributory Negligence, 3rd ed., pp. 36 et seq.; Tilling, 19 Times L. R. 539, 20 Times L. R. an and Redfield on the Law of Negligence, 5th et seq.; Clerk and Lindsell on the Law of Torts, 502-5; Beven on Negligence, 2nd ed., pp. 156, Smith on Negligence, 2nd ed., p. 232; Scott v. Wicklow R. W. Co. (1861), 11 Ir. C. L. R. ett v. Ball, 4 F. & F. 472; Pollock on Torts, 7th

reat majority of the cases in which the question e" negligence has arisen, the act or omission re- constituting such negligence has not unnaturally uent in time to plaintiff's act of contributory But it seems repugnant to common sense to ex- the application of this wholesome rule all cases in ough after the danger of the plaintiff has become ave been apparent, the defendant has done every- in his power to avert the mischief, he failed to ely because of the continuing effect of some anter- nce of his own. For instance, if in the present ants' car had not been equipped with a brake or

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reversing machinery, the sending out of a car thus deficient would have been an act of negligence clearly preceding in point of time any negligence of plaintiff. If, excluding all other negligence on the part of defendants, it were clear that, upon the emergency arising owing to plaintiff's want of care, the use of the locking brake or reverse would have avoided the injury, should defendants be heard to say that because the want of brake or reverse was due to an antecedent omission of duty on their part, the failure to avert the mischief would not amount to "ultimate" negligence? . . . .

Again, the duty of defendants to plaintiff, breach of which would constitute "ultimate" negligence, only arose when her danger was or should have been apparent. Prior to that moment there was an abstract obligation incumbent upon them to have their car equipped with efficient emergency appliances ready and in condition to meet the requirements of such an occasion. . . . Upon the emergency arising, that abstract obligation became a concrete duty owing to plaintiff to avoid the consequences of her negligence by the exercise of ordinary care, breach of which would constitute actionable negligence. Up to that moment there was no such breach of duty to plaintiff. In that sense the failure of defendants to avoid the mischief, though the result of an antecedent want of care, was negligence which occurred, in the sense of becoming operative, immediately after the duty, in the breach of which it consisted, arose. It effectively intervened between the negligence of plaintiff and the happening of the casualty.

Where, as here, both plaintiff and defendant are present at the time of the occurrence producing injury, the crucial question appears to be—which of them had, or but for some disabling negligence of his own would have had, the last opportunity to avoid the mischief? The duty of both plaintiff and defendant, each to avoid the consequences of negligence on the part of the other, is the same. Where negligence of the plaintiff is established, if, after the peril is imminent, both plaintiff and defendant might by the exercise of ordinary care avoid the casualty, the plaintiff cannot recover. If, without any fault of his own, neither could then avoid the catastrophe, again the plaintiff cannot recover; he is in the like plight if he alone could, or but for his own fault might

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vented the mischief. But if, in like circum-
fendant alone could, or but for his own default
from so doing might, have avoided the casu-
be held liable. . . .

class of cases where a situation of imminent
created either by the joint negligence of both
efendant, or, it may be, by that of the plain-
hich, after the danger is or should be appar-
period of time of some perceptible duration
both or either may endeavour to avert the
astrophe. The negligence that created the
still operative in one sense, has, in another
self and ceased to operate. It has given place
ape its consequences. Such efforts, within the
ary care, it is the duty of both plaintiff and
ake. If, from no other cause than the nature
n itself, such efforts duly made prove unsuc-
gh the incapacity of the person making them
o be due to the negligence which created the
ril, that negligence at this stage bears to such
er the relation of a remote cause or cause sine
hat of a proximate and efficient cause. But if,
g the difficulties of the situation, efforts to
luly made would have been successful but for
ted incapacity which rendered such efforts
he negligence that produced such a state of
t merely part of the inducing causes—a remote
e merely sine qua non—it is, in very truth, the
roximate, the decisive cause of the incapacity,
of the mischief.

English or Canadian authority, so far as I am
is inconsistent with the judgments of Piggott,
zgerald, B., in the Irish Court of Exchequer,
blin and Wicklow R. W. Co., 11 Ir. C. L. R.
there taken and so well expressed in Smith on
d indorsed sub modo by Pollock, appeals to
ly sound. Moreover, to permit incapacity
default of the defendant himself to serve as
a failure to prevent injury to the plaintiff,
e otherwise inexcusable, savours of injustice.

ut hesitation, because of the volume of Ameri-
opposed to this view and of the manifest diffi-

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culty which it may occasion in some cases in drawing a clear distinction between primary and ultimate negligence, I have reached the conclusion that negligence of a defendant incapacitating him from taking due care to avoid the consequences of the plaintiff's negligence, may, in some cases, though anterior in point of time to the plaintiff's negligence, constitute ultimate negligence, rendering the defendant liable notwithstanding a finding of contributory negligence of the plaintiff. Such anterior default of the defendant is, in my opinion, "ultimate" negligence when it renders inefficient to avert injury to the plaintiff means employed by the defendant after danger became apparent, and which would otherwise have proved adequate to prevent the mischief, or renders the defendant wholly incapable of employing such means, though time was afforded for his using them efficaciously but for such disabling negligence.

In the present case it is clear upon the motorman's own story that after plaintiff's danger became apparent to him, there was a period of time, short it may be, but distinctly perceptible, in which the motorman endeavoured to avoid running down the girl by lessening the momentum of his car. The situation in which plaintiff found herself was apparently such that her efforts at self-preservation after the peril became imminent were futile because of the intrinsic difficulties of her position. It may be that the motorman's efforts were likewise unsuccessful solely because of the difficulty of the situation then developed. But, having regard to the facts that another moment of time would have enabled the unfortunate girl to have escaped; that the momentum of a car with power thrown off will be considerably reduced in running 127 feet, or even 87 feet; that it was admitted by the motorman that power was not thrown off until the car was 87 feet west of the south-west corner of the Osgoode Hall property; and that there was evidence upon which a jury, had it not been withdrawn from them, might have found that it was negligent not to have had the power off when the car was 40 feet to the east of that corner, or at least before it passed the corner—it seems impossible to say that, had this issue been presented for their consideration with all the evidence bearing upon it, and under a charge defining "ultimate" negligence, as outlined above, the jury might not have found that, notwithstanding her contributory negligence, defend-

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ants might in the result by the exercise of ordinary care have avoided injury to plaintiff. An important part of the evidence was unfortunately withdrawn, in my opinion improperly, from the consideration of the jury; and, though the learned Judge did not in terms direct the jury that ultimate negligence of the defendants must consist in some new physical act or omission of the motorman subsequent to plaintiff's danger becoming apparent, that is the purport and effect of all that he said upon this branch of the case.

For these reasons I regard the verdict and the judgment founded upon them as unsatisfactory, and I would set them aside and direct a new trial of this action. But, inasmuch as the attention of the trial Judge was not clearly directed by counsel to the bearing upon the question of ultimate negligence of the portion of his charge which is in my opinion unsatisfactory, and disregard of the rule as to reducing speed and the direction as to shutting off power when approaching crossings is not alleged as a ground of negligence upon the record (though evidence upon these matters was admitted without objection), costs of the former trial and of this appeal should be costs in the cause.

CLUTE, J., concurred. His written opinion was based upon the same grounds as that of ANGLIN, J.

MULOCK, C.J., also concurred.

MAGEE, J. JANUARY 26TH, 1907.

TRIAL.

MANES TAILORING CO v. WILLSON.

Company — Subscription for Shares — Allotment—Notice—Waiver—Issue of Preference Shares—Necessity for By-law—Resolution of Directors—Companies Act—Promissory Note for Price of Shares—Failure of Consideration.

Action on a promissory note for $1,500, dated 15th April 1904, made by defendant, payable 10 days after date, to the

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order of "The Manes Tailoring Co.," at the Imperial Bank of Canada.

MAGEE, J.:—Defendant pleads that the note was given for the amount of 150 shares of preferred stock in the plaintiff company, which he made application for, but that he cancelled the application before allotment, and that no allotment was ever made, and no notice of allotment given, and that plaintiffs are not holders for value.

He also pleaded that the note and application were obtained by fraudulent misrepresentation by plaintiffs' agent . . . but he offered no evidence to substantiate these allegations.

The evidence shewed that one Nixon was employed by plaintiffs as an agent to sell for them shares in their capital stock. On 15th April, 1904, Nixon received from defendant a subscription made out on a printed form of the company for 150 shares. The subscription is as follows: "To the Manes Tailoring Company, Limited. I, the undersigned, do hereby subscribe for 150 shares of the preferred capital stock of the Manes Tailoring Company, Limited, which stock will receive out of the earnings and profits of the company a dividend up to 8 per cent. before any allotment of dividends or profits shall be declared to the common stock, and I do . . . covenant, promise, and agree with the said company to pay on the date hereof $10 for each share subscribed for, or such lesser number as may be allotted. In witness whereof I have hereunto set my hand and seal this 15th April, 1904." This was signed and sealed by defendant.

With this subscription and for the amount of the shares, which are $10 each, defendant at Newmarket delivered to Nixon the promissory note sued upon. Nixon delivered both documents to the company's vice-president at the company's office in Toronto on 16th April, 1904, and the latter at once directed that 150 preferred shares be placed to the credit of defendant in the company's stock ledger, which was done. This the vice-president considered an allotment.

On 19th April defendant wrote Nixon that, as unfortunate circumstances had turned up since seeing him, he

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eed to withdraw his application and note at
asking him to return them by mail, and pro-
him $10 for the trouble he had been at.

f the same date, 19th April, signed by plain-
sident, was sent addressed to defendant at
nforming him that his application had been
the stock allotted and placed to his credit on
books, and that his note was being placed
erial Bank, where he would meet the amount
later than 28th April. It does not appear
e that letter was sent the company had been
efendant's letter to Nixon, but the vice-presi-
n the letter on the day of its date.

April Mr. Lloyd, a solicitor, on defendant's
o the company's office and saw the manager
him that defendant would not take the stock,
hat it had been allotted to defendant.

e same day a special meeting of directors was
resolution was passed that the defendant's
150 shares of the preferred capital stock of
e accepted, the allotment of the shares con-
e certificate be duly issued for the shares on
e note given for the . . . $1,500. At
re that meeting was called, the manager knew
letter to Nixon of 19th April.

ny was incorporated on 13th November, 1902,
ario Companies Act. The letters patent . . .
ence to preferred stock, and name 5 persons
directors. . . .

to secs. 22, 26, 32, 33, 41, 45, 46, 47, of the
t.]

any had their first general meeting of share-
th November, 1902. All existing shareold-
say, the 5 persons named as provisional direc-
sent. It was moved, seconded, and unanim-
that the number of directors of the company
upon 4 of the provisional directors were
rs. Another motion was carried authorizing
to carry into effect some preliminary agree-

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ment as to the subscribed stock, with full authority to arrange for terms and conditions of sale of stock, preferred and common, and allot and dispose of the same on such terms as they regard best in the interest of the company.

Thereupon the 4 directors immediately held a meeting and elected a president, vice-president, and manager, and on motion a "form of application for preferred stock" was adopted (being the same form which defendant signed as already mentioned). It was then moved, seconded, and carried "that we offer for sale not more than 1,500 shares of the company to be sold as preferred stock of the company at par value of $10 per share, on which the said preferred stock shall receive out of the net profits as declared by the directors of the business of the company each year the whole amount thereof until the said profits of the company shall be equal to a dividend on the preferred stock sold at time of declaring dividends from year to year, and that no dividend shall be applied to the common stock of the company until such profits shall exceed a sum equal to 8 per cent. on such preferred stock as sold—the surplus profits over and above said dividend of 8 per cent. shall be wholly applied as dividend on the subscribed common stock."

It was then moved, seconded, and carried "that the code of by-laws prepared and presented be adopted subject to confirmation by the shareholders in following term"—setting out by-laws numbered 1 to 22 inclusive. Of these by-law No. 7 provides that the company's affairs shall be managed by a board of "not less than 4 directors." Then a motion was carried that a commission of 10 per cent. be paid for sales of preferred stock.

Immediately after this directors' meeting, the shareholders' meeting was resumed, all shareholders being present. "The full minutes, resolutions, etc., of the board of directors were presented to the shareholders by the secretary," and on motion "the whole was confirmed unanimously," and another motion was carried giving the directors full power to make all necessary arrangements for sale of stock and to do all necessary things incidental to the sale of stock and conduct of business.

On 9th February, 1904, the first annual general meeting of the company was held, at which it is stated 985 shares

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were represented. A motion was then carried that "the shareholders approve and confirm the sale by the directors of $3,900 of the preferred capital stock of the company, and hereby authorize the directors to make any further sales of the said preferred capital stock that they may deem necessary in the interest of the company." Another motion was also carried, that a dividend of 8 per cent. be paid on the preferred stock of the company as referred to in the directors' report, and that the manager be instructed to issue cheques for the amount.

On 6th April, 1904, at a special meeting of directors, 2 applications for preferred shares were accepted, and apparently no other business done. On 25th April, as already mentioned, defendant's application was accepted by the directors at a special meeting at which no other business was done.

There does not appear to have been any delegation by the board of directors to the vice-president or any one else of the power of allotting stock, and in the only instances referred to the allotment was made by the board. . . . I do not think that by-laws 9, 13, and 14, as to the duties of the president, vice-president, and manager, depute it, assuming the right to exist. As to the right, see Hutton v. Scarborough Cliff Hotel Co., 4 D. J. & S. 672; Angus v. Gas Meter Co., [1897] 1 Ch. 361; Hill's Case, 10 O. L. R. 501, 6 O.W.R. 606; 3 Edw. VII. ch. 7, sec. 35; Re Pakenham Pork Packing Co., 4 O. W. R. 22; and Re Bolt and Iron Co., 10 P. R. 434. I therefore find that there was no allotment until 25th April. But, as the subscription was under seal, with an absolute covenant by defendant to pay, his notification of withdrawal could have no effect: Nelson Coke and Gas Co. v. Pellatt, 4 O. L. R. 481, 1 O. W. R. 595; Re Provincial Grocers Limited, 10 O. L. R. 705, 6 O. W. R. 744.

Then was there stock of the character subscribed for in existence? The only authority relied upon for issue of preferred shares is that given at the meetings of shareholders and directors on 27th Novmber, 1902. For plaintiffs it was urged that the motion for the issue of preferred shares which was carried at the directors' meeting amounted to a by-law, though in form only a resolution. Indeed the vice-president says now that it was intended as a by-law, and the

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solicitor is of the impression that it was prepared as part of the by-laws. The vice-president says that the company's seal is affixed to by-laws, but not to resolutions. It is not shewn that the seal was affixed to this one. More than that, immediately after passing it, the board proceeded to pass "by-laws" expressly so called, and these are numbered and commence with No. 1, not No. 2, and they are passed subject to confirmation by the shareholders, whereas nothing about confirmation is said in the resolution.

Section 77 of the Ontario Companies Act requires that a book or books be kept containing the minutes of the meetings and the by-laws duly authenticated, and such minutes shall be verified by the presiding officer of the company. This, I think, means that the by-laws are to be entered by themselves, and not merely as part of the minutes. It does not appear whether that was done. The Act does not require any particular form for a by-law. . . .

[Reference to Drake v. Hudson River R. R. Co., 7 Barb. (N.Y.) 508.]

Assuming for the moment that it was in form sufficient, the Act requires that it be passed by the directors first and then confirmed by the shareholders. It was passed by a board of directors, but that board consisted of only 4, apparently in pursuance of the resolution of shareholders passed earlier on the same day and the election thereunder. The number of directors in the letters patent was 5, and the proceedings for reduction of the number under sec. 45 had not been taken. It may be said that by the unanimous consent at the shareholders' meeting, at which every person then interested in the company was present, a full board and the shareholders combined: as to which see People v. Sterling Burial Case Co., 82 Ill. 457; State Savings Association v. Nixon-Jones Co., 25 Mo. App. 642; and see Regina v. Westwood, 2 Dow. & Cl. 21, 4 B. & C. 781, as to general powers of shareholders. But here the shares were created with equal rights by the legislature (see Hutton v. Scarborough Cliff Hotel Co., 4 D. J. & S. 672), and it has prescribed for the change of those rights, for what the Lord Chancellor in the last mentioned case calls "an essential alteration of the basis of the company," a mode involving consideration twice by two different bodies acting in differ-

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s. . . . In this respect, also, I consider that
ents of the Act were not complied with.

ting that it was duly passed, was it really a by-
h as the Act requires, or was it only in sub-
lution? A by-law is defined as "a rule or law
a corporation or association for the regulation
tions and concerns and of the rights and duties
rs among themselves:" 5 Am. & Eng. Encyc. of
., p. 87. And it is there said that a resolution
rdinarily to reach special and individual cases,
-law to be valid must operate generally. See
n on Corporations, secs. 935, 936.

2 of the Companies Act authorizes a by-law for
d issuing any part of the capital stock as pre-
k." Above all things, in the interest of the
oth of common and preferred shares, certainty
mber who would have preference is of prime
d the legislature does not allow the cancellation
shares actually issued without the sanction of
ry letters patent. This resolution does not
pecified number of shares as preferred shares,
o "offer for sale not more than 1,500 shares."
s still more important in view of some evidence
vice-president that it was not intended that
stock should get all profits over 8 per cent.,
ote that he also says that the preference is only
r by itself, not for all years. The resolution
ain not only the amount of preferred stock, but
unt of common stock. It is not the same as if
d shares were fixed at 1,500 and only part of
That at least would limit the common stock
res, and a purchaser of common stock would
any might have to share with him in the sur-
The resolution of the directors has indeed
aracter of a recommendation of policy to be
or of a temporary resolution of the number
tly placed on the market, than one of finality.
son, I think it is really a resolution, and not a
that if it can be called a by-law it does not com-
22. . . .

dant's covenant only bound him to pay for such
ribed for as should be allotted to him, and there

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were none to allot, there has been a total failure of consideration for the note.

There was no notice of allotment given after the directors' meeting of 25th April, but defendant waived that by Mr. Lloyd's notification of the manager that he would not pay. . . .

Action dismissed with costs.

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THE

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O AND INCLUDING FEBRUARY 2ND, 1907).

TORONTO, FEBRUARY 7, 1907. No. 4

MASTER. JANUARY 28TH, 1907.

CHAMBERS.

JOHNSTON v. JOHNSTON.

Wife—Interim Alimony and Disbursements—of Valid Marriage—Amount Allowed.

plaintiff for interim alimony and disburse-

or plaintiff.

for defendant.

ER:—The parties were admittedly married on and lived together as man and wife for some ey then separated, and plaintiff went to reside er, with an allowance of $4 a week from her this was discontinued after 3 months, and ion for alimony was brought on 24th October. interim alimony and disbursements was made nber, which stood over to allow plaintiff to be defendant alleges that plaintiff had been pre- d in 1878 to one Stratford, who was still alive re was no issue apparently of either marriage. om plaintiff's depositions that she was living n 1878, being then 14 years of age. She then atford to New York, where they were mar- t least believes. After about a year she went divorced on her husband's application, as she She says she had some sort of certificate of

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this, which she shewed defendant and then burnt in hi presence. Plaintiff further says that she informed defer dant of all these facts before their marriage—" there wasn' anything kept from him—he saw the divorce papers—I tol him everything, told him my life from beginning to end."

I am not aware of any case of this kind, where . . a previous marriage, followed by an alleged divorce, ha been set up as an answer to a motion for interim alimony

It was argued for defendant that plaintiff had put her self out of Court by admitting a prior marriage, and tha she must displace this by shewing a valid divorce before an order could be made in her favour.

It was said in reply that for the present her whol testimony must be taken together, and if the marriage wa assumed to be legal so must also the alleged divorce. It wa pointed out that her statement that she had fully informe defendant of these facts was not denied and that, whateve might be the final decision at the trial, she was at least en titled to an opportunity of establishing her claim.

The decisions in Walker v. Walker, 10 P. R. 633, an Thrower v. Thrower, 3 O. W. R. 541, seem to shew that th order should be made. I refer especially to what the Chancellor said in the former case at p. 634. . . .

It is a case for moderation in amount, and $4 a week and $30 for disbursements will be all that should be allowed, an the trial should take place as soon as possible.

CARTWRIGHT, MASTER. JANUARY 28TH, 1907.

CHAMBERS.

ATTORNEY-GENERAL EX REL. BOULTER v. TOWN OF BRAMPTON.

Stay of Proceedings—Action against Municipal Corporation —Injunction against Illegal Acts — Attorney-General— Validating Legislation—Application for.

Motion by defendants to stay the action until a pending application for an enabling statute should be disposed of. The action was brought to restrain defendants from proceed-

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ing to do certain things (alleged to be ultra vires) so as to comply with the terms of an offer of $10,000 made by Mr. Andrew Carnegie for the erection of a public library in the town of Brampton.

T. J. Blain, for defendants.

E. D. Armour, K.C., for plaintiff.

THE MASTER:—It is not easy to form an opinion as to the view of the majority of the ratepayers. The town council passed a resolution on 15th October instructing the application to the legislature, in consequence of the letter of 8th September from plaintiff's solicitors notifying them of this action being in contemplation. The necessary fiat was granted only on 26th December, and, no doubt, was strenuously opposed. Then at the elections of 7th instant the relator was elected a member of the council. If the majority were of his opinion on this point, it might be presumed that any defence would be abandoned, and the application to the legislature would be withdrawn. As it is, it must be presumed that when the fiat was granted the Attorney-General was satisfied that the action was reasonable. He might still have control over it. To him this application should be made. I cannot see any ground upon which the Court can be asked to stay the action. It is at least uncertain whether any enabling Act will be passed. The possibility that the application may be successful is not a sufficient ground, and the motion must be dismissed with costs to plaintiff in the cause. But the time for defendants to plead will be extended to 6th February to enable them to make such application to the Attorney-General as they may be advised.

MAGEE, J. JANUARY 28TH, 1907.

TRIAL.

MITCHELL v. COLONIAL INVESTMENT AND LOAN CO.

Mortgage—Building Society — Terminating Shares — Payment—Interest — Amount Necessary to Discharge Mortgage—Accelerated Payments.

Action to recover alleged overpayments made under protest by plaintiff to defendants to obtain a discharge of a mortgage made by one Manning to the Ontario Permanent Build-

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ing and Loan Association, and assigned to defendants, land deeded by Manning to plaintiff subject to the mortgag

H. M. East, for plaintiff.

A. McLean Macdonell, for defendants.

MAGEE, J.:—It is said that the mortgagee association we incorporated under the statutes relating to building societie The mortgage was dated 8th February, 1900, and recited th the mortgagor Manning was then a member of and the hold of 11 shares in the association, and had applied to them f a loan of $1,100, and the association had agreed under the rules and by-laws to advance that sum in respect of the shares, upon his executing the mortgage to secure the pa ment, under the said rules and by-laws, of the monthly su scriptions, fines, premiums, interest, and other moneys ther inafter mentioned, and that the mortgagor had agreed assign the shares to the association and to execute the mor gage as security for the due performance of his obligations the association and compliance with the said rules and b laws. The lands are mortgaged thereby to the association i pursuance of the said agreement and in consideration $1,100, being the full amount of $100 in respect of each the said 11 shares, now paid to the mortgagor out of th funds of the association. Shortly, the effect of the mortgag is, that it will be void on payment of $1.100 on 1st Novembe 1912, with interest at the rate of 10 4-5 per cent. per annum payable monthly, on the 1st day of each month; but, if 15 payments of $13.20 each be punctually made on the 1st da of each month, they will be accepted in satisfaction and th mortgage will be void. . . .

There was not here any representation by defendants tha they would allow the pre-payment on any particular basis o at any particular rate of discount. They simply stated a amount which they would accept, and it was for plaintiff t comply with their terms, or keep her money until she coul have the right to make them take it—whether under the mort gage or the plan of operations, by-laws, etc. As there is n dispute about payments, the only other possible credits whic might exist would be profits in the association, but no evi dence was given that there were or could be any profits, and can hardly infer any from the statement . . . that th association had gone into liquidation. Plaintiff does not in deed make any claim for profits or base her action thereon.

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Counsel for plaintiff contended that she was entitled to relief because defendants had taken an assignment of the land mortgage without getting an assignment of the shares. Whatever ground for objection to paying them or to their threatened foreclosure suit, it is no ground for the present action, and the shares are now worthless, all the value thereof having been applied in reduction of the mortgage, in pursuance of the plan of operations which she cites and invokes.

Can it be said that plaintiff was not getting a privilege or favour from defendants in being allowed to pay in advance? The mortgage made the whole principal due on default in payment of interest, and defendants were entitled, if they so chose, to bring an action to recover it. The Court of Appeal has held in McFadden v. Brandon, 8 O. L. R. 610, 4 O. W. R. 349, that the Statute of Limitations runs from such default, and the mortgagee may thus be compelled by the default of the mortgagor to bring his action for his own protection long before the money would otherwise be payable. But to extend that so as to compel the mortgagee to accept his money in consequence of the mortgagor's default would be to enable the latter to take advantage of his wrong, and repudiate the bargain at his own pleasure. R. S. O. 1897 ch 121, sec. 17, which allows overdue mortgages to be paid without notice and without extra interest, expressly states that it is not to apply to principal which becomes due by reason of default in payment of interest or instalments.

Then were defendants precluded from asking anything more than the principal and the interest to the date of payment, in view of their letter to Manning of 17th February, 1903, as to foreclosure? It does not ask payment of principal, but speaks of the arrears, and suggests a substantial payment, which means, I take it, a substantial payment on account of the arrears. It makes no reference to the fact that the default made the principal payable. It is such a letter as might be written if there were no such clause in the mortgage. It should therefore be considered apart from that clause. Does a threat of foreclosure proceedings if instalments of interest be not paid amount to a demand of the whole principal though not yet payable? . . .

[Reference to Cruso v. Bond, 1 O. R. 384; Green v. Adams, 2 Ch. Ch. 134.]

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I do not see that the letter, if it could be held to have t effect of an action actually begun, implies an election to ha the whole amount paid.

Then was there any compulsion upon plaintiff? There no evidence that the letter to Manning ever came to the kno ledge of herself or her solicitor before the payment or befo action. The payment, so far as is shewn, followed defen ants' letter of 4th February and Mr. East's of 20th Febr ary in natural sequence, and was purely voluntary so far she was concerned.

Plaintiff has been made to pay what, considering the cu rent rates, was very high interest; but she bought the p perty with the knowledge that the mortgage called for Judging from defendants' agreement for purchase of t mortgages, they paid more for it than they received. Th are not responsible for the grossly fallacious "estimates" the mortgagees' pamphlets, or I would not feel at liberty allow them costs.

As it is, the action is dismissed with costs.

BRITTON, J. JANUARY 28TH, 19

TRIAL.

COOLEDGE v. TORONTO R. W. CO.

Street Railways—Injury to Passenger Alighting from Ca Negligence—Contributory Negligence—Findings of Jury

Action to recover damages for personal injuries sustai by plaintiff, by reason of the alleged negligence of defenda in the operation of one of their cars, upon which she wa passenger.

The action was tried before BRITTON, J., and a jury. T jury made findings in favour of plaintiff. The trial Ju reserved judgment upon a motion by defendants for a n suit, and a motion by plaintiff for judgment on the findi of the jury.

H. Cassels, K.C., for plaintiff.

D. L. McCarthy, for defendants.

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J.:—Plaintiff, a stranger in Toronto, on 7th
906, boarded a south-bound Bloor and McCaul
her way to the eastern part of the city. She
and obtained a transfer ticket. At the corner
enue and College street she changed to a College
reet car, presented her transfer ticket to the
l informed him that she wished to go east along
The transfer ticket was left with plaintiff, and
go as she desired. Arriving at Queen street,
a fellow passenger if that was King street, and
that it was not. Arriving at the corner of King
reets, the car stopped; plaintiff did not get out,
oved on. While crossing King street plaintiff
by the fellow passenger . . . that this was
r plaintiff to transfer. Plaintiff says that she
lled the bell, giving the signal for the car to
d not know that the car did not stop at the
King street. After the signal the car slowed
ght the car stopped. She got up, took hold of
right foot was upon the second step, when the
rk, and she fell to the ground, and was badly
accident happened a little distance below the
King street, near the corner of Melinda street.

evidence contradicting plaintiff as to how the
red, witnesses stating that plaintiff got off the
as in motion.
ctor of the car stated that plaintiff did not ring
sked him to do so; that she waved her hand to
ang the bell; but he did not see her get off, or
where she got off or fell off.
gence charged in the statement of claim against
that of negligently and unskillfully operating
the railway . . .; that defendants' servants
r to start before plaintiff had alighted there-
ereby threw plaintiff violently to the ground.
actically the way the case was submitted to the

ave found that defendants were guilty of negli-
at such negligence was the cause of the accident
The finding of the jury as to the particular
that the conductor should have told plaintiff
ff.

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The case was not argued as to any neglect of duty on the part of the conductor to plaintiff when the car arrived at the north side of King street, nor as to what he should have done, if anything, after he saw plaintiff wave, or heard her ask him, if she did ask him, to ring the bell, as a signal to stop the car.

The jury having found that the accident was due to the negligence of defendants, and as, in my opinion, there was evidence of negligence which could not properly be withdrawn from the jury, it is my duty, at this stage of the case, to direct that judgment should be entered for plaintiff. . . . Plaintiff should have leave to amend.

Judgment for plaintiff for $641 with costs.

JANUARY 28TH, 1907.

DIVISIONAL COURT.

KEW v. CITY OF LONDON.

Highway — Non-repair of Sidewalk — Injury to Person — Negligence of Municipal Corporation—Notice of Defect —Evidence.

Appeal by defendants from judgment of MABEE, J., in favour of plaintiff for the recovery of $600 damages in an action for personal injuries sustained by plaintiff by reason of a fall upon a sidewalk in the city of London alleged to be out of repair.

The appeal was heard by FALCONBRIDGE, C.J., BRITTON, J., RIDDELL, J.

T. G. Meredith, K.C., for defendants.

E. T. Essery, London, for plaintiff.

BRITTON, J.:—Plaintiff's own account of the accident is that on Sunday 15th October, 1905, between 10 and 11 o'clock in the forenoon, she and her daughter Elizabeth were on their way to St. Mathew's church, in the city of London. They were walking westerly upon the walk on the northerly

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street. Plaintiff was on the outer or southerly
lk, and her daughter beside her on the inside.
up," as plaintiff says, and caught her right
er to fall. She "tripped on a plank and fell."
s and her daughter were not far away at the
cident. Plaintiff did not at first see what had
all, but a short time afterwards she ascertained
loose plank in the sidewalk," and she found
daughter going back with Mrs. Phillips. The
ot know what had tripped her mother, and she
nd out, and "came on this loose plank." The
"stood on the plank, and it went up free,"
e end. "Then she got off, and Mrs. Phillips
and Miss Lottie Phillips, and they turned it
d it was loose, no nail holding it." Plaintiff
ew this walk; had on the previous Sunday
e place where the accident happened, and had
thing wrong there. She says, however, in an-
estions:—"Q. You attend church nearly every
s. Q. And up to that time had met with no
No. The sidewalk was bad, and I was care-

ndition she refers to was afterwards explained
ank broken in the centre, a few boards to the
the accident happened. This did not cause
ntil after the accident she had not seen or
oose board which, in her opinion, caused her to

me that the plank on which plaintiff tripped
. There is no dispute about the size of this
a 2-inch plank, about 6 feet long and not more
ches wide.

that a 2-inch plank of the width of only 3 or
nany of such, if placed upon the earth or so
ringers that the ends did not project far enough
nd to "fly up" by a person stepping upon the
uld be reasonably safe, even if not nailed or
, and it would not be negligence on the part of
to have such a walk.

he evidence this plank was not upon the earth
something that allowed one end to rise, and so
o persons when two walking side by side—not

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being upon level earth and not being so placed as indicat upon stringers, and not fastened—it was in fact dangero

. . .

At the time of the accident the walk at the place wh the accident happened was not in a reasonably safe conditi

The only other point is notice to defendants. There w no actual notice of this defect, and if the case had stood up the evidence on behalf of plaintiff alone I would not ha found defendants liable.

There are facts from which notice must be implied. F some reason the foreman, "as to sidewalks of that part of t city" where this accident happened, had his attention dra to the walks there. He inspected the Dundas street sidew in this vicinity before the accident himself "probably tw a week;" and his man "may be 4 times a week;" and he l this walk examined on the Saturday morning previous to accident. There must have been some reason for such cl and frequent inspection, and this loose plank not upon le ground should have been discovered. There is no doubt up the evidence that the loose plank was there and danger some considerable time before the accident. . . . T case disclosed is very different in defect from a broken pla near to the earth, or a plank removed, or from a hole in plank walk. And it is very different from a defect sudde appearing in a walk previously good, and where there is reason to think anything has gone wrong, and where an a dent occurs shortly after a place becomes dangerous. U the special facts of this case it must be held that there constructive noice.

Appeal dismissed with costs.

RIDDELL, J., agreed, for reasons stated in writing, in course of which he referred to Castor v. Uxbridge, 33 U R. 113, 127; Ellis v. Great Western R. W. Co., L. R. 9 C 551, 557; Dublin, Wicklow, and Wexford R. W. Co. v. S tery, 3 App. Cas. 1155, 1183; Scott v. Lake Erie and Det River R. W. Co., per Ferguson, J., at Sandwich, unrepor Humblay v. Grand Rapids, 99 Mich. 292; Broburg v. Moines, 63 Iowa 523; Ruggles v. Nevada, ib. 185; McN v. Town of Bracebridge, 10 O. L. R. 360, 6 O. W. R. 75.

FALCONBRIDGE, C.J., agreed that the appeal should dismissed with costs.

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JANUARY 28TH, 1907.

C.A.

LOVELL v. LOVELL.

Supreme Court of Canada — Leave to Appeal — ity for—Alimony—Amount Involved not Ascer- —Special Circumstances — Dissenting Judgments rt below.

by defendant for leave to appeal to the Supreme nada from the judgment of this Court (8 O. W. irming (MEREDITH, J.A., dissenting) the judg- ivisional Court (STREET, J., dissenting), and the f the Chancellor (6 O. W. R. 621, 7 O. W. R. L. R. 547), in favour of plaintiff in an action for eave was sought because it was said that more was not involved, although probably much more aid by defendant if the judgment stood. The limony had not been fixed.

ion was heard by MOSS, C.J.O., OSLER, GARROW, and MEREDITH, JJ.A.

atson, K.C., for defendant, contended that sub- large amount was involved, that the question n important one to the parties and to the public, definition of legal cruelty, and that the fact that ts of the Divisional Court and Court of Appeal nimous, was a ground for granting leave.

K.C., for plaintiff.

J.O.:—Defendant has made application for leave the Supreme Court under the Dominion Act, ct. ch. 34, sec. 1 (e). The motion presupposes no right of appeal under any of the preceding and we have to deal with it on that assumption.

ot called upon on this application to consider the the right to appeal without leave, the determin- ch must in the last resort rest with the Supreme

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Court. If defendant has the right to appeal without leave, our granting or refusing it cannot affect him.

But, if special leave is necessary, then some special grounds must be shewn to take the case out of the statute, which provides that no appeal shall lie to the Supreme Court from any judgment of the Court of Appeal for Ontario unless in the specified cases. Defendant's case has been submitted to the consideration of 9 Judges. . . . The case really turned upon the facts, and nothing more than a question of fact is involved.

The circumstance that two Judges dissented from the opinion of the majority, and even the further circumstance that they were in favour of granting leave to appeal, has not been considered a special ground for granting the leave: Robinson v. Toronto R. W. Co., cited in Cameron's Supreme Court Practice, p. 222; and see Attorney-General v. Scully, 33 S. C. R. 16.

It is urged that the case is an important one to the parties, and, no doubt, it is; as are many other case in which no right to appeal is given. But it is also a case which it is important should be brought to an early conclusion. If the parties are ever to be reconciled, it will not be by the continuance of the litigation, with all its embittering consequences. And in the meantime plaintiff, who is without means save her alimony allowance, will be subject to bear, as best she can, the large expenses incidental to or connected with the conduct of her case. We have no power to bind the Supreme Court by any order as to costs in any event of an appeal, and defendant would not even express his willingness to agree to bear all the costs incurred or to be incurred in any event of the appeal.

But, quite apart from these considerations, there have been no special reasons shewn for granting the leave applied for.

Motion dismissed with costs.

OSLER, GARROW, and MACLAREN, JJ.A., concurred.

MEREDITH, J.A., dissenting, was of opinion, for reasons stated in writing, that there was a right of appeal without leave, and therefore this Court had no jurisdiction to entertain the motion, and it should be refused on that ground; but, if the application were entertained, that it should be granted.

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JANUARY 28TH, 1906.

C.A.

LY v. MICHIGAN CENTRAL R. R. CO.

ijury and Consequent Death of Person Crossing Negligence—Findings of Jury—Train "behind -Failure to Shew Negligence or that Deceased -Dismissal of Action.

y defendants from judgment of BOYD, C., upon of a jury, in favour of plaintiffs for the recov- 0 in an action tried with a jury at Sandwich. The re the widow and children of one James Hanly, ed by a train of defendants near Windsor on 9th . The deceased was returning to his farm from a waggon drawn by two horses late at night, and, highway crossing, the waggon and horses were e train and the man and horses killed. The that there was negligence of defendants, in that as behind time. The jury were asked whether bell was ringing, but they did not answer that he engine driver was the only witness of the dis- e said that the deceased was not sitting up and re was some evidence that he had been drinking; erence was that he was lying down in the wag- the horses to find their way home.

eal was heard by MOSS, C.J.O., OSLER, GARROW, and MEREDITH, JJ.A.

lmuth, K.C., and E. C. Cattanach, for defendants.

, Windsor, and E. Meek, for plaintiffs.

.A.:—The negligence charged in the statement that defendants' servants in charge of the train James Hanly and his horses omitted to give the rnings before coming to the crossing where the k place. It is also alleged, though not charged e, that the engine "was running at too fast or rate of speed in order to make up time, being

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then running behind its schedule time." As to the omission to ring the bell or blow the whistle, while the evidence was conflicting, the weight of it was entirely in defendants' favour. As to the rate of speed and the train being behind time at the crossing in question, it was shewn that the rate was the usual one, and that the train was about 10 minutes behind time. The jury did not answer the question put to them as to the former, but in answer to other questions found that the deceased was killed by the negligence of the railway company, and that such negligence consisted in the train being "behind time." They assessed the damages at $3,950. There was evidence that the team of horses killed by the collision was worth $300, but there was no direct evidence of any pecuniary loss to plaintiffs beyond the facts that the deceased was a man of about 45 years of age and a farmer, nor does it appear how much was allowed for the horses and how much in respect of the other causes of action.

It appears to me upon the whole case that the appeal must be allowed, on the ground that no actionable negligence has been found by the jury.

Section 215 of the Railway Act, 3 Edw. VII. ch. 58 (D.), requires that all regular trains shall be started and run as nearly as practicable at regular hours fixed by public notice. This provision was probably enacted in the interest of passengers or persons using the railway, and not of persons using the highways crossed by the railway, who are supposed to be sufficiently protected by the statutory warnings required to be given of the approach of the train. But, even if the latter may invoke the section, much more would be necessary to prove negligence than the mere fact that the train did not pass the given point at the scheduled time. No doubt, if it had done so, the deceased would not have been there, and the accident would not have happened. But the regularity to be observed is only that which is from time to time practicable under all the circumstances, and if the section is applicable at all in such an action as the present, it would certainly have to be proved, in order to fasten upon defendants liability for negligence, not only that the delay was a negligent delay, but also that the deceased had in some way been misled by defendants into supposing that no train was coming, and therefore "might go over the crossing in safety without taking the precaution of looking up and down the line or any other such precaution as might be otherwise neces-

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y:" Smith v. South Eastern R. R. Co., [1896] 1 Q. B. 8. There is an entire absence of any evidence of this nd, and therefore the action fails on the plain ground at plaintiffs have not proved that the negligence of defendts caused the death of deceased.

The evidence of failure to give either of the statutory rnings was conflicting, and the weight of evidence is ainst plaintiffs' contention on that point, a fact which quite counts for the omission of the jury to answer the question which their attention was specially directed to it as the ound of negligence prominently put forward and mainly lied upon at the trial. If we could see that the considerion of this had been merely overlooked by the jury we ight think it right to direct a new trial, as was done in bban v. Canadian Pacific R. W. Co., 23 A. R. 115. But I n see nothing in the case which would justify taking this urse.

There are many other difficulties in plaintiffs' way, which uld have made a new trial necessary even if the answers of e jury had disclosed a finding of actionable negligence, but ese it is not necessary to deal with, as the action must be smissed on the ground already mentioned.

Appeal allowed and action dismissed with costs, if deanded.

MEREDITH, J.A., agreed in the result, for reasons stated in riting.

MOSS, C.J.O., GARROW, and MACLAREN, JJ.A., also conurred.

RITTON, J. JANUARY 29TH, 1906.

TRIAL.

LATTA v. FARGEY.

efamation—Slander—Privileged Occasion—Qualified Privilege—Malice—Evidence of—Disagreement of Jury—Nonsuit.

Action for defamation, tried with a jury at Belleville. The jury disagreed, and judgment was reserved by BRITTON, J., upon defendant's motion for a nonsuit.

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E. G. Porter, Belleville, for plaintiff.

W. S. Morden, Belleville, for defendant.

BRITTON, J.:—The words charged as defamatory we alleged to have been spoken by defendant of plaintiff in l business of cheesemaker. In each of 10 paragraphs of t statement of claim plaintiff charges the speaking of wor by defendant of plaintiff, to divers persons, at different tim but the evidence did not support plaintiff in 9 of these. the close of plaintiff's case his counsel contended that was entitled to go to the jury upon the evidence as supporti the averment in paragraph 12 of the statement of claim, a he also asked leave to amend paragraph 8 so as to char what, as was contended, was proved by the evidence of t witness Henry Fairman.

As to the amendment. It would not, if allowed and mad help plaintiff. The charge is that defendant spoke the wor on 8th December, 1905, to Fairman, who was then preside of the "Bronk" factory. At that time plaintiff was applicant for the position of cheesemaker at the "Bronl factory. According to the evidence of Fairman, the conver tion between him and defendant took place in February, 19 and that factory had employed a cheesemaker before Chri mas in 1905, and the conversation had no reference to a application for employment of plaintiff. The conversati by defendant with Fairman was because of a rumour tl defendant had written a damaging letter to Fairman abo plaintiff. No such letter was proved, and defendant den having written such a letter. The words spoken by defend to Fairman, as proved by Fairman, were not, in my opini actionable, and so the amendment asked for should not allowed.

The 12th paragraph of the statement of claim char words spoken by defendant in August, 1905, in presence J. B. Lowry, cheese inspector, defamatory of plaintiff.

Whatever defendant did say on the occasion mentio was said to Mr. Lowry, the cheese inspector, and was in form of complaint or suggestion for reform. Mr. Lo was the proper person to whom complaint or suggest should be made.

I ruled at the trial that the occasion when the wo proved were spoken by defendant was privileged. This

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upon plaintiff the onus of proving malice. At the close of plaintiff's case, counsel for defendant asked to have the case withdrawn from the jury, on the ground that there was no proof of speaking the defamatory words as alleged, and that there was no evidence of malice in speaking words on the occasion of privilege.

I reserved my decision upon defendant's motion, and allowed the case to go to the jury, and the result was a disagreement of the jury.

Counsel for defendant renewed his motion and asked for dismissal of the action.

A present reference to my notes of the evidence of J. B. Lowry confirms me in my ruling at the trial that the conversation between him and defendant when the words complained of were used was on an occasion of qualified privilege. Mr. Lowry was an inspector of cheese factories and also an inspector in cheesemaking, employed and paid by the government. Defendant was president of and plaintiff was the cheesemaker in a factory visited by Lowry. The conversation and complaint were on the occasion of an official visit by Lowry to the factory. It was not only the right of defendant but it was his duty to say what he did, believing it to be true.

Was there evidence of malice? Malice, as applied to the use of defamatory words, may be described as "any improper motive which induces the defendant to defame the plaintiff," "any indirect motive other than a sense of duty," "any corrupt motive, any wrong motive, any departure from duty:" see Odgers, 4th ed., p. 321: "It is not necessary that the defendant should be actuated by any special feeling against the plaintiff in particular." "If the defendant desires to injure the plaintiff, and thinks the safest method by which to attain that end is by defaming the plaintiff on a privileged occasion, that in law is malice against the plaintiff:" Odgers, 4th ed., p. 322. . . .

I do not find any malice. There was no evidence of previous ill-will or personal hostility between plaintiff and defendant—no threats, no rivalry, no squabbles—that is to say, nothing that could fairly or reasonably be called a squabble.

In the conversation with Lowry there was no violence in defendant's language. It was argued that there was extra-

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vagance of language in describing the "starter," and where it was kept by plaintiff. Taking the circumstances altogether, I do not think malice could be implied from what defendant said to Lowry. It was argued that, even if the words spoken to Fairman were not in themselves actionable, they were evidence of malice on the part of defendant when he complained to Lowry. I do not think so. . . . Fairman's evidence is that defendant said, "We had a little trouble with him (plaintiff) at the factory; where he kept his starter looked like a swill barrel." That is in substance what defendant said to the inspector, and informing Fairman of what the trouble was about is not evidence of malice existing at the time. . . .

The case for defendant is strengthened by this proposition: "If the evidence adduced is equally consistent with either the existence or non-existence of malice, the Judge should stop the case, for there is nothing to rebut the presumption which has arisen in favour of the defendant from the privileged occasion:" Odgers, 4th ed., p. 323, and cases there cited. Spill v. Maule, L. R. 4 Ex. 232, and Tapp v. Brenot, 3 O. W. R. 80, are in point.

Action dismissed with costs.

JANUARY 29TH, 1907.

DIVISIONAL COURT.

BARBEAU v. PIGGOTT.

Bailment—Machine—Repairs — Lien for—Contract—Rental of Machine—Reasonable Sum for — Possession—Implied Contract of Letting—Counterclaim—Damages—Costs.

Appeal by defendant from judgment of MULOCK, C.J., in favour of plaintiffs.

Plaintiffs alleged that while engaged in the construction of a section of the Guelph and Goderich Railway in May 1906, the defendant wrongfully took possession of a certain steam shovel, the property of plaintiffs; and they sued in trover. The defendant alleged that by agreement the shove

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leased to him and by him put in repair, and he claimed en thereon. The shovel was seized by plaintiffs under plevin order. Judgment was given declaring defendant led to a lien for $204.91, less a reasonable sum for the of the shovel, fixed at $180, and that upon payment of difference between the sums, namely, $24, the plaintiffs ld be entitled to retain possession of the shovel.

The appeal was heard by FALCONBRIDGE, C.J., BRITTON, RIDDELL, J.

. M. Douglas, K.C., for defendant.

. M. German, K.C., for plaintiffs.

IDDELL, J.:—I think it is clear that no contract was between the parties by telephone, and it is equally clear none appears in writing, unless it be considered that document sent by defendant to plaintiffs is such a con-. This can be the case only if the conduct of plaintiffs its receipt is such as to convince the trial tribunal that ntiffs accepted it. While the whole conduct of plaintiffs ishes strong evidence of acceptance, it cannot be said the evidence is conclusive. The Chief Justice has found nst the contention of defendant, and I cannot say that he rong.

Defendant was in possession of the shovel, and had, at request of plaintiffs, made certain repairs, the value of h he was to "charge to us and deduct from rent of el." There was no express contract as to the rental, consequently defendant is liable as on a quantum meruit. amount fixed by the Chief Justice, $200 per month, s to be reasonable. Defendant being rightfully in pos-ion of the shovel, no replevin would lie unless and until ut himself in the wrong. Upon demand made for pos-ion on behalf of plaintiffs, defendant refused to deliver possession; and it is this refusal that is alleged by plain-to render defendant liable in trover.

It is held by the Chief Justice that defendant had a lien n the property for the amount of the repairs. I cannot e in that view. Defendant was not in the position of a kman who by his skill and labour had enhanced the value the shovel, and it had not come into his possession for such purpose. Of course, the common law gives to

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every one who bestows labour or expense upon a chattel in th way of his trade or occupation a lien upon such chattel. Bu to extend the doctrine to a case of this kind would result i the acquisition by one who had borrowed his neighbour's ca riage, and, at his request, had a new tire put in a wheel, of lien upon the carriage so improved. Moreover, the prin ciple that an agreement for payment inconsistent with th existence of a lien, excludes any lien which might otherwis be implied, and that in general an agreement which provid for payment in a particular mode has such effect, may we prevent the Court implying a lien in this case: Chase Westman, 5 M. & S. 180; Jones on Liens, 2nd ed., secs. 73 732, 1003, 1005. And, even if a lien in fact did exist, think defendant by his conduct when the demand for po session was made must be held to have waived it. E claimed possession of the shovel under an alleged agreeme which has been held not to exist: Caunce v. Spanton, 7 M. G. 903; Addison on Torts, 7th ed., p. 504, and cases cite in notes (m) and (n).

While no lien did exist, I think defendant was entitled t the possession, and for this reason. Having taken posse sion of the shovel under an arrangement that he should r pair it, charge the cost of the repairs to plaintiffs, and tak this amount out of the rent, I think there is an implied co tract of letting, to continue until the amount of the re accruing due equals the value of the repairs. No doubt, th leaning towards implied agreements has received a chec from such cases as Regina v. Demers, [1900] A. C. 103, an Hill v. Ingersoll, etc., Road Co., 32 O. R. 194; but I canno reconcile what was done here with the absence of such a agreement. This right which I think defendant had is qui different from a right of lien. Had a lien existed, plaintif on paying the amount would have been entitled to the po session of the shovel—under the real contract plaintiffs mu await the determination of the term. The rent being $200 pe month, and it being found that at the time of the seizu the repairs exceeded the accrued rent by $24.91, it follow that, even at the time of the execution of the replevin orde defendant was entitled to hold and use the shovel 3¼ day longer.

I think then that plaintiffs' action fails, and it shoul have been so held. But this point was not taken upon th

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pleadings or in the Court below. Defendant should, therefore, in no case be entitled to the costs of the appeal: Garrett v. Roberts, 10 A. R. 650.

Defendant counterclaimed for damages, and it was agreed before us that, instead of referring it to a Master to assess the damages, and instead of an action being brought upon the replevin bond, we should, upon the evidence given at the trial, determine the damages to which defendant is entitled. He was entitled to such damages as arise from his being deprived of the use of the shovel for 3¼ days. In the absence of other evidence, we should take the rental value of the shovel as being the measure of damages. I fail to find anything in the evidence to justify us in giving any larger sum. The evidence of defendant is directed to the damage he suffered on the hypothesis that his contention as to the contract should be sustained, and is largely a complaint as to the sums he had to pay to procure another shovel, and the expense occasioned by such delay. But this would have been necessary had plaintiffs waited until the time when they might lawfully take possession. I think, then, the damages should be fixed at the amount of the rent; and, as defendant is saved the payment of a corresponding sum in rent, he is entitled simply to receive the $24.91 which he has been awarded by the Chief Justice. To put the matter in a few words: had defendant not been deprived of the possession of the shovel, he would have gained $24.91 at the expense of the $24.91 which he had already put into repairs. He has lost nothing by the act of plaintiffs, but must be now paid the $24.91 which plaintiffs owe him.

As to costs, the Chief Justice, finding, though on other grounds, that defendant was entitled to possession, gave no costs to either party. That order should not be interfered with. The result of the appeal is to modify perhaps the form but in no way the substance of the judgment. Defendant should, therefore, pay the costs of the appeal. No action is to be brought upon the replevin bond, nor against any one for taking possession of the shovel.

BRITTON, J., concurred, for reasons stated in writing.

FALCONBRIDGE, C.J., agreed that the appeal should be dismissed with costs.

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CARTWRIGHT, MASTER. JANUARY 30TH, 1907
TEETZEL, J. FEBRUARY 5TH, 1907

CHAMBERS.

TRUSSED CONCRETE STEEL CO. v. WILSON.

Jury Notice—Irregularity—Claim under Mechanics' Lien Ac—Exclusive Jurisdiction of Court of Chancery—Clain for Immediate Payment—Discretion—Striking Out.

Motion by plaintiffs to set aside a jury notice filed anc served by defendants.

W. E. Middleton, for plaintiffs.

Grayson Smith, for defendants.

THE MASTER:—This action arises out of a building con tract to the amount of $36,600, which the claim for extra increases by $4,300. Plaintiffs admit payments of $34,30(and sue for the balance. The contractors and the owners ar the only parties to the action.

Plaintiffs claim: (1) that defendants may be ordered t pay to plaintiffs forthwith the balance claimed with interes and costs; (2) in default that the lands may be sold and th proceeds dealt with pursuant to the Mechanics' Lien Ac The statement of defence makes the usual allegation of fai ure to complete the work, of overpayment, of no final certi cate from the architect by reason of defective work and ma terials; and defendants counterclam for $12,000 to comple the work, as well as for $13,500 as liquidated damages fo failure to finish the work before 1st October, 1905, as pr vided by the contract.

The statement of defence and counterclaim were delivere on 17th January, 1907, and two days later defendants serv a jury notice. Plaintiffs now move to set this aside as irreg lar, in that the action is one which before the passing of t Administration of Justice Act, 1873, could only have be brought in the Court of Chancery, and upon the ground th the procedure provided by the Mechanics' Lien Act does n contemplate a trial by jury. . . .

The first ground seems to be met by the fact that the A ministration of Justice Act and the Mechanics' Lien Act we both passed on the same day, 29th March, 1873. The M chanics' Lien Act gave a new statutory right which previou

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had no existence, and therefore it cannot come strictly within the terms of sec. 103 of the Judicature Act.

It is further to be observed that, even if sec. 103 would apply, the claim for a personal order or judgment for immediate payment of the amount claimed—a remedy not given by the Mechanics' Lien Act—under . . . Sawyer v. Robertson, 19 P. R. 172, would prevent the application of sec. 103.

As to the other ground, that the Mechanics' Lien Act does not contemplate a trial by jury, plaintiffs are probably right . . . The original Act, 36 Vict. ch. 27, after providing for claims within the jurisdiction of the County or Division Courts, by sec. 6 directed that "in other cases the lien may be realized in the Court of Chancery according to the ordinary procedure of that Court." This was continued in the Act which appears as ch. 120 in R. S. O. 1877. In R. S. O. 1887 ch. 126, that section disappeared, as the Court of Chancery had been merged in the High Court of Justice by the Judicature Act of 1881. Instead is found a section, 29, which is reproduced in substance in sec. 31 of R. S. O. 1897 ch. 153.

Power to try these actions as found in secs. 33 and 34 of the Act last cited was given by 59 Vict. ch. 35, secs. 31 and 32. These seem by necessary inference not to contemplate a trial by jury. The only case in which that can possibly be done is where the action is tried by a Judge of the High Court, which it was stated by counsel on the argument is what plaintiffs desire now.

While it seems very probable that the trial Judge will dispense with the jury before dealing with the 33 items of extras amounting to $4,295.79, and varying in amount from $1 to $874; and while this may very probably be done on an application to a Judge in Chambers, I cannot say that the matter is so plain that the jury notice can be struck out by me as irregular. I cannot say what Rule it violates.

The uniform practice, so far as known to me, has been to try the cases without a jury, and the point is so far from clear that, while I feel bound to dismiss the motion, I think the costs should be in the cause.

Upon appeal TEETZEL, J., on 5th February, 1907, refused to interfere on the ground of irregularity, but made a substantive order striking out the jury notice as a matter of discretion.

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CARTWRIGHT, MASTER. JANUARY 31ST, 1907.

CHAMBERS.

APPLEYARD v. MULLIGAN.

Discovery—Production of Documents—Deposit in Court—Delivery out.

Motion by defendants for an order for delivery out of documents mentioned in defendants' affidavit on production, and deposited by defendants with the deputy clerk of the Crown at Hamilton, in pursuance of defendants' undertaking to so deposit them, given on motion by plaintiff for an order to that effect.

J. E. Jones, for defendants.

J. Bicknell, K.C., for plaintiff.

THE MASTER:—The motion is supported by an affidavit of defendants' solicitor that these documents will be necessary on the examination of plaintiff for discovery, which defendants wish to take as soon as possible. . . .

[Reference to Darling v. Darling, 10 P. R. 1; Small v Attwood, 1 Y. & C. Ex. 37; Walker v. Cooke, 3 Y. & C. Ex 276; Beckford v. Wildman, 16 Ves. 438.]

If the documents are wanted for plaintiff's examination they can be transmitted on præcipe to the required office of the Court, and be returned when the examination has taken place. It is difficult to see from the documents themselve why there is so much energy displayed as to whether the should remain in Court or be returned to defendants. Both parties, however, agree (for once) in thinking this an important matter, and defendants have affirmed that thes documents are relevant to the question at issue betwee the parties.

Both parties have had ample time to make copies, an have done so, if I am rightly informed. The next Ottaw assizes will begin on 2nd April. It seems proper to allo the documents to remain in Court until say 20th March, o whatever is the last day for plaintiff to give notice of tria If that is not done, defendants can renew this motion. A present I do not think it should be granted, but in dismi

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sing it I make the costs in the cause, as I cannot say at present that it was improperly made or improperly opposed.

No material was filed by plaintiff. The motion was opposed as being premature until the action has been tried. If the letter of 5th December, 1906, is all that plaintiff wishes to remain in Court, the order may direct delivery out of the other two documents.

MAGEE, J. JANUARY 31ST, 1907.

TRIAL.

FAULKNER v. GREER.

Timber—Issue as to Ownership — Severance by Stranger — Waiver of Tort—Conveyance of Land by Husband to Wife —Title to Timber—Amendment of Issue—Parties—Money in Court—Payment out.

Interpleader issue. Plaintiff affirmed and defendants denied that on 29th September, 1905, plaintiff was entitled to $3,781.11, moneys paid into Court by the Barnett-McQueen Company, Limited, being proceeds of 1,224 spruce and tamarac piles alleged by plaintiff to have been cut from lot 1 on the west short of the Black Bay, in McTavish township, on lake Superior, as against defendants, who delivered the piles to the company before the date mentioned.

F. H. Keefer, Port Arthur, for plaintiff.

W. H. Blake, K.C., and W. McBrady, Port Arthur, for defendants.

MAGEE, J.:—The issue was directed by an order made on the application of the Barnett-McQueen Company in an action brought by Mrs. Faulkner, the plaintiff in the issue, against J. & C. Greer, the defendants in the issue, and the said company. By the indorsement of the writ of summons in that action the plaintiff claimed against all defendants damages for cutting and taking timber off lot 1, and a declaration that the plaintiff was entitled to the proceeds of the timber. The interpleader order directed the company to pay into Court to the credit of the issue the $3,-

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781.11, less their costs of the application and of such payment into Court, and upon such payment the action was thereby discontinued as against the company, and the order reserved all other questions of costs and all further directions to be disposed of by the Judge at the trial of the issue. The defendants J. & C. Greer opposed the application. Under this order the company paid into Court $3,745.71, their costs being $35.40.

Prior to 2nd June, 1905, the plaintiff's husband, George Faulkner, was the owner of lot 1. By deed dated 2nd June 1905, he conveyed the lot and other lands to the plaintiff in consideration of $100, as shewn by the registrar's abstract of title put in by consent. They then and since lived in Toronto.

Lot 1 occupies the whole eastern extremity of a promontory jutting out into Black Bay from its western shore. The straight line forming the western boundary of the lot is about a mile and two-fifths in length, and extends clear across the promontory. Lot 1 is adjoined on the west by lots 2 and 4, lot 2 being south of lot 4. Lot 1 is said to contain about 400 acres.

It is clear that a considerable quantity of timber was cut and removed from lot 1 during the year 1905 without authority from Mr. or Mrs. Faulkner, and without their knowledge.

Two men named Dunn and Evoy had in February, 1905 agreed to work in partnership in cutting timber. Evoy, who was called as a witness, professes to have met a stranger named Stuart about the last of February, who said he had timber to cut, and proposed to be their partner in cutting it. No inquiry was made as to whose land it was, and no mention is made of any discussion as to price. The trio went on and cut on this lot 1. Stuart, according to Evoy, said that was the place he was entitled to cut, and gave him to understand he was overseer or agent. Before cutting, Dunn and Evoy made an agreement of 4th March, 1905, with the defendants' firm, J. & C. Greer of Port Arthur, for the sale to the latter of 1,500 or more tamarac and cedar piles of specified sizes and quality at 4¾ cents per foot, to be delivered on the lake shore at or near Ouimet siding, not later than 15th May, 1905, payment of 80 per cent. to be made on all piles cut at the end of each month—to be free from a

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claims and dues. After being engaged for some time in cutting the timber, Stuart parted company from Dunn and Evoy, leaving them to continue the work. He seems to have been satisfied with the team, harness, and sleigh used by the firm, which Evoy says had cost $276, for his share at parting. Evoy says that was the value of the timber standing. Dunn and Evoy kept at work cutting timber and hauling it to the bay, where it was deposited on the ice or on skidways on the ice near the edge. Ellis, who worked for them till 5th May, says that when he left it was expected that in two days more the hauling would be finished. Evoy says they finished cutting within a week of the first week of May, and the piles were hauled and deposited on the ice. They returned to Port Arthur, but afterwards in two or three weeks went back and formed the logs into a raft, under a second agreement made with defendants by which Dunn and Evoy were to get ¾ cents per foot for doing so. This work occupied about 15 days. On 11th July defendants went with a tug to tow the raft to Port Arthur, where it subsequently arrived.

On 16th August defendants received from the Barnett-McQueen Company, who were purchasing for the Canadian Northern Coal and Wood Company, for the purpose of constructing a dock at Port Arthur, an order for 1,000 piles, more or less, of specified quality and sizes and subject to inspection and approval and having the butt ends sawed off, the price being 7 cents per foot for spruce, and 8 cents per foot for tamarac, f.o.b. dock site. Under this order 1,233 piles brought by the tug from Black Bay were delivered to the Barnett-McQueen Company, who at first rejected 255, but afterwards, being short of piles, accepted all but 90. The price for the 1,224 accepted was $3,781.11, and is the amount here in question. It is not clear when the piles were accepted by the company, but apparently some were accepted about 16th or 18th August, and all had not been accepted on 6th September, when Mr. Faulkner arrived on the scene. He had received information about 1st August of the theft of the timber, and, after writing to Dunn and Evoy and receiving no reply, he employed a detective and traced the piles to the defendants and the company. He went to Port Arthur from Toronto to see them and claimed the piles on 6th September. He then offered defendants to take $2,000 in settlement. On 7th Septem-

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ber his solicitor wrote the company, on plaintiff's behalf, asking redelivery of the piles or payment of their full value as delivered in Port Arthur, and warning them against paying Messrs. Greer for them. On 15th September he wrote the company again asking payment, and on 23rd September wrote offering to consent to the company using those not already used, the price of all to be held until Mrs. Faulkner's right be established. No arrangement seems to have been come to, and the action followed.

Shortly after beginning to cut the timber Dunn and Evoy applied to defendants J. & C. Greer to advance them moneys on account of the contract. At various dates commencing 25th March, 1905, and extending up till 2nd September, defendants advanced to them $2,447.61 in cash and goods and payments of orders, and on 25th September a further payment of $4.05, making in all $2,451.66. Defendants had no knowledge as to the ownership of the timber. When making the agreement of 4th March, James T. Greer had asked Evoy the name of the farmer from whom he said he was getting the piles, and Evoy said it made no difference. About the end of April or early in May Greer went out to the land to see how Dunn and Evoy were getting on, in view of his advances, but he says he did not know whose lot it was, and he did not inquire at any time. He told Dunn and Evoy they would have to get a clearance before settlement, and they obtained from Stuart a paper dated 24th July, 1905, stating that he, Stuart, had sold them timber on lots 4 and 6. It does not appear that they had cut any upon these lots, and from its situation lot 1 could not be mistaken for them. One published map shews lot 4 as including what is actually the southerly portion of lot 1, but only a small part of the cutting was done on that parcel.

Beside the moneys paid Dunn and Evoy, defendants also claim to have expended $430 for the tug in towing the raft to Port Arthur, although Mr. Horne, their witness, thinks the expense of doing so at that time, July, 1905, would be about $150, and defendants also expended for labour in cutting off the butt ends of the piles, to comply with the company's order, and otherwise, $137.

It is admitted that the piles delivered to the company were all cut by Dunn and Evoy on the shore of Black Bay. There is no evidence that they cut anywhere else than the

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two tracts at the north end and on the southerly part respectively of lot 1. Evoy admits that 1,224 piles is approximately correct. The evidence shews that enough timber was cut on lot 1 to have produced the whole 1,233 piles. There is no evidence as to how many more were received by defendant in the raft. . . .

I conclude that the cutting on lot 2 was small, and that it would be a sufficient estimate to allow that 10 piles of a total length of 396 feet may have come from that lot, of which the proportionate value out of $3,781.11 for 1,224 would be $31. . . .

I therefore find that of the 1,224 piles accepted by the company 1,214, of a total length of 48,142 feet, for which the amount payable by the company to defendants would have been $3,750.11, came from lot 1. I find that all those were cut and removed to the ice, just outside the limits of lot 1, before the date of the deed to plaintiff, but that neither plaintiff nor her husband had any knowledge thereof at the execution of that deed. As that deed appears to have been for a valuable consideration, I must assume that, as both parties supposed the timber to be there, the consideration included it, and the wife would be entitled to it as vendee—even if the deed does not have the effect of conveying it to her as a part of the realty severed by a stranger without the knowledge or consent of the owner, and therefore not deprived of its character of realty as between the grantor and grantee. Under R. S. O. 1897 ch. 119, sec. 12, the deed carries with it the trees.

As to the value of the piles, it is not disputed that the price agreed upon between defendants and the company was their fair value at Port Arthur. . . . On all the evidence, I would put the value of the 1,214 piles as standing in the tree at $600. The present question, however, is not what damage the owner of the land might recover in an action for trespass, but whether, as claimed in the action and asserted in this issue, she is entitled to the proceeds of those piles. They had been removed by defendants themselves from the public waters immediately in front of her land, without any inquiry as to ownership and without taking the precaution as to "clearance" which defendants about the same time admitted to be needful by requiring Dunn and Evoy to procure one before settlement. The facts are not far from those in Smith v. Baechler, 18 O. R. 293.

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Nothing had been added to the material in the logs. Every part of them was plaintiff's property. Had they remained with defendants at Port Arthur, plaintiff might have recovered possession of the logs themselves and sold them to the company: Gilmour v. Buck, 24 C. P. 187; McDonald v. Lane, 7 S. C. R. 462; McGregor v. McNeil, 32 C. P. 538. An equitable title would be sufficient: Carter v. Long, 26 S. C. R. 436. So also she might have recovered the logs from the purchasers, the company, if they detained them Deal v. Potter, 26 U. C. R. 578.

Had the company paid defendants the price, plaintiff could have waived defendants' tort and recovered the money as money had and received by defendants to her use on a sale on her behalf: Buckland v. Johnson, 15 C. B. 145, per Maule, J., pp. 150, 165, and per Cresswell, J., p. 167; Oughten v. Sippings, 1 B. & Ad. 241; and see Lythgoe v. Vernon, 5 H. & N. 180. In the action she sought a declaration that she was entitled to that price. Add to this, that defendants could not, in view of plaintiff's claim and title recover the price from the company, nor could the company divide it between them and plaintiff. By her intervention she ended defendants' right to it, and became the only one entitled to be paid by the company, and it is because the company were left in doubt whom to pay that they caused these parties to interplead. The substantial question in this issue is, who was the owner of the piles?

At the trial, when it appeared that the cutting was before plaintiff's deed, her counsel applied for leave to amend by joining her husband as co-plaintiff, and put in his consent thereto. The motion stood over till all the evidence should be heard. In support of the application Bryce v. Kinnee, 14 P. R. 509, was cited, and . Canadian Pacific R. W. Co. v. Rat Portage Lumber Co., 1 O. L. R. 273, 278, 5 O. W. R. 473, as shewing that the amendment could be made. Even had I the power under the order or otherwise, in the absence of the company whose money was paid in, and who might not have made the application for interpleader if neither plaintiff nor defendants were entitled, I would not make the order, as I consider it unnecessary.

I find the issue in favour of plaintiffs to the extent of $3,750.11, being the proceeds of 1,214 piles out of 1,22

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neously stated as 1,230 in the issue, and that plaintiff erefore entitled to the whole sum of $3,745.71 paid Court, with any accumulated interest thereon. I dir- hat the same be paid out to her, and that her costs of issue and of the interpleader application be paid by ndants.

JANUARY 31ST, 1907.

DIVISIONAL COURT.

McMURCHIE v. THOMPSON.

se in Action — Voluntary Assignment of Fund to Wife of Assignor—Informality—Validity as Equitable Assignment—Subsequent Assignment for Value—Priority—Notice to Holders of Fund—Executors—Oral Notice to One.

Appeal by plaintiffs from judgment of ANGLIN, J., 8 O. R. 637, determining an issue in favour of defendant.

W. Proudfoot, K.C., for plaintiffs.

E. L. Dickinson, Goderich, for defendant.

THE COURT (MEREDITH, C.J., TEETZEL, J., MABEE, J.), missed the appeal with costs.

RTWRIGHT, MASTER. FEBRUARY 1ST, 1907.

CHAMBERS.

PEPLER v. EGAN.

rticulars—Statement of Claim—Sale of Horse—Breach of Warranty—Unsoundness—Special Damage—Personal Injuries.

Motion by defendant for particulars of the statement f claim.

J. T. Loftus, for defendant.

E. E. Wallace, for plaintiff.

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THE MASTER:—Plaintiff is a physician practising i Toronto. Defendant is a dealer from whom plaintiff, a alleged, bought a horse warranted to be sound and cit broken, docile, and safe for use in the city. The pric was $175. These representations, it is said, were untru The horse, it is alleged, was unsound and uncontrollabl so that it bolted and ran away, "causing plaintiff to su tain personal injuries and damages." . . .

It was conceded on the argument that particulars c the unsoundness should be given. The other particula should, I think, also be furnished. They are in th nature of special damage, and when plaintiff is only askin $500, and the return of the purchase money, particula will be useful to enable defendant, if so advised, to ava himself of Rule 419. Odgers on Pleading, 5th ed., p. 17 says: "Always ask for particulars of losses, expenses, an other special damage."

The particulars should be delivered in one week, an defendant should have 8 days thereafter to plead. Cos to defendant in the cause.

CARTWRIGHT, MASTER. FEBRUARY 1ST, 190

CHAMBERS.

HILL v. GOW.

Particulars—Statement of Claim—Action to Set aside Co veyance as Fraudulent — Allegations of Fraud — Suf ciency.

Motion by defendants for particulars of the stateme of claim, before delivery of the statement of defence.

Grayson Smith, for defendants.

W. E. Middleton, for plaintiff.

THE MASTER:—Action by a judgment creditor of de fendant Gow against that defendant and the executors c his deceased father to set aside a conveyance by Go

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r, made ten days before the trial of the action
aintiff got judgment. This deed is alleged to
made to prevent plaintiff recovering anything
l in the action.

h and 9th paragraphs of the statement of claim
ges that the transaction was the result of "a
scheme and conspiracy," and that the con-
question was fraudulent and void, and was for
and pretended consideration of $1,500."

nts ask for "particulars of the fraud and fraud-
and of the facts and circumstances upon which
s are based," and "of the fraud alleged as
conveyance and of the facts and circumstances
such charge is based."

with the contention of plaintiff's counsel that
e sufficiently set out to enable defendants to

te true that the debtor defendant has left the
d that the other defendants, who are his
cutors, may not in one sense be presumed to
knowledge of the actual facts attending the
transaction. On the other hand, they have
papers, and should be able to satisfy them-
her the $1,500 was actually paid by their tes-

cannot possibly know how this was. For all
the consideration may have been nominal.
s is so or not does not seem material under
97 ch. 115, sec. 3, sub-sec. 1. The statement
lows the well settled precedents applicable to
as the present. The facts which plaintiff
are clearly set out, and the whole onus is on
blish his case out of the mouth of adverse

es not seem any ground on which the motion
ported, and it must be dismissed with costs
in any event. . . .

Rule 271 has been complied with, taken in con-
h Rule 276. I do not find anything in the
n In re Rica Gold Washing Co., 11 Q. B. D.
rt the motion.

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MORGAN, JUN. CO.C.J. FEBRUARY 1ST, 1907.

SCRUTINY.

RE WESTON LOCAL OPTION BY-LAW.

Municipal Corporations—Local Option By-law—Scrutiny of Votes of Electors — Qualification of Voters — Recount — Majority—Computation — Spoiled Ballots — Unmarked Ballots.

Application to Morgan, Jun. J. of the County Court of York, by a ratepayer of the village of Weston, for a "scrutiny" of the ballot papers cast upon a local option by-law submitted to the electors of the village of Weston on 7th January, 1907. The application was made under the provisions of sec. 369 of the Consolidated Municipal Act of 1903.

J. Haverson, K.C., for the applicant.

H. E. Irwin, K.C., for the village corporation.

W. E. Raney, for certain ratepayers.

MORGAN, JUN. CO.C.J.:—By sec. 141 of the Liquor License Act, municipalities are given power to pass by-laws prohibiting the sale of liquor within the municipality, provided such by-laws be approved by the electors in manner required by the Municipal Act. Presumably this means in manner required by those sections of the Municipal Act referring to the assent of the electors to be given to all by-laws which require such assent. Sub-section 2 of sec. 141 has been repealed, and the amending Act of 1906 provides that the assent of the electors shall not be testified merely by a majority of votes given for or against the by-law, but that the by-law shall only be deemed to have been carried if the votes given for the by-law represent three-fifths of the "electors voting upon such by-law." I have been requested, before proceeding to an actual scrutiny of the ballots as counted by the clerk of the municipality, to determine two legal questions which enter very materially into the mode and scope of such scrutiny.

The first point is whether or not, under the authority given to me by sec. 369 of the Consolidated Municipal

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t, I have power, and the duty is cast upon me, in going o such scrutiny of ballots, to go into the qualification of voters who have cast the ballots, for the purpose of ertaining whether they had the right to vote or to cast se ballots.

Secondly, I am asked to determine whether, in ascerning the total of electors voting upon the by-law, I uld count, in that total, ballots cast for or against the law, but which, under the provisions of the statute, e, in counting, been rejected for some defect in the lot paper.

Upon the first question, after very serious consideration, ntertain very little doubt; though it is a question of some nplexity, owing to the unfortunate use of the words crutiny of the ballot papers," which, when one looks the whole scope and context of the provisions applicable that section, can only mean "recount." "Vote" and allot" are not synonymous terms, are not convertible ms. "Vote" arises from the franchise granted to the ctor. It is the expression of his opinion upon any given ject upon which, as an elector, he has a right to exss his opinion. "Ballot" is the vehicle by which, der the statute, he conveys that opinion in a concrete m so that it can be counted either for or against that in ect to which he is voting. So that, when sec. 369, der which this proceeding is taken, speaks of a "scrui of the ballot papers"—and all through the subsequent tions dealing with this particular subject the "scrutiny ballot papers" is referred to and not one word said out a scrutiny of the votes—I am driven to the conision that the draftsman was unfortunate in his use the word, and that he only meant what is called in the nicipal Act, with reference to the election of members a municipal council, a "recount," because a scrutiny the ballots under the powers granted me by sec. 369, d the provisions in the following sections as to how I uld exercise those powers, make it obligatory upon me, t only to scrutinize the ballots, that is to say, to look them and examine them, but, also to count them, and, ving counted them, to ascertain upon which side the bals are counted either for or against the by-law, and to rtify to the municipal council the result of such scrutiny

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or recount; thereby indicating that the functions I ha to perform under the statute are simply a repetition b me, or rather a review by me, of the work done by th municipal officer when he first made his count and retur with this difference, that the returning officer does n scrutinize the ballots, but simply makes return from th count given by the deputies, who have scrutinized th ballots for him, whereas I scrutinize the ballots, determin as to their validity or countability as ballots, and mak the count, and either reach the same result the clerk ha reached, or, for some reasons arising from a scrutiny of th ballots, make an alteration in the result, making it diffe ent from the result the clerk has reached. On the whol therefore, I, though with some doubt, have reached th conclusion that my powers in this proceeding are confine simply to a scrutiny and counting of the ballots, and tha I have neither power nor is it my province to inquire b hind the ballot at all, more especially to inquire as whether the persons casting ballots are possessed of th legal qualifications to entitle them to vote at an electio of this description.

In arriving at this decision I have not overlooked th wording of sec. 372, giving to me the like powers and auth ority as are possessed by a Judge upon the trial of th validity of the election of a member of a municipal counci These powers are contained in secs. 219 to 244 (a), inclu sive, of the Municipal Act, portions of which provide fo an investigation of the right of voters to the franchis which they have assumed to exercise. The question, o course, is whether sec. 372 clothes me on this applicatio with all the powers and authority contained within sec 219 to 244 (a) inclusive.

In determining this I am materially assisted by th words in sec. 372 "as to all matters arising upon th scrutiny." I take these to be words of limitation, and the effect to be that I am clothed with such of the powers an so much of the authority given to a Judge upon a trial o the validity of an election as may be necessary in dealin with all matters arising upon the scrutiny. Section 36 clearly states that this scrutiny is "a scrutiny of the ba lot papers." I am, therefore, of the opinion that the effec of sec. 372 does not go further than to invest me wit

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ıs, for example, the power provided by sec. 228
production of ballot papers, voters' lists, and
s of the election.

nd point is, whether or not, in ascertaining
umber of electors voting" for and against the
all include ballots deposited by the electors
arked, and upon which there is no visible ex-
the will of the elector, and also ballots in re-
ich the elector casting his vote has expressed
; has upon the ballot done something which,
ovisions of the statute, vitiates it as a count-
nd makes it uncountable either for or against

is question I have met with a good deal of
nd the judgment I am about to give is not
hout doubt, but is the best conclusion I can
a careful consideration of all the provisions of
and looking to its spirit. It has been argued
hat where an elector, obtaining his ballot paper
ialled by the deputy returning officer, marking
urse with his cross as provided by the statute,
ne reason which must be unknown, for the
ot be called upon to disclose it, puts some other
ication upon the ballot which under the statute
ueless on a counting of the ballots cast either
nst the by-law, notwithstanding that it is so
e statute not countable either for or against
the person who cast that ballot has in fact
o becomes, within the designation of the statute,
"electors voting upon such by-law." The
not without force, not without great force.
ology of the statute seems to give colour to it.
r hand, it is argued that the provisions of the
n not people who have exercised their right
an invalid manner, but people who have exer-
right to vote so that the exercise of it shall be
ing to law, and have some influence in determin-
estion upon which they are voting. Now in
by me with the scrutiny and counting of the
ave first to scrutinize the ballots; I have to re-
se which are defective as ballots according to
ns of sub-sec. 1 of sec. 174 of the Consolidated

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Municipal Act, which provides that no ballot paper which has not upon its back the name or initials of the deputy returning officer, or on which anything, except the initials of the deputy returning officer on the back, is marked by which the voter can be identified, or which has been torn defaced, or otherwise dealt with by the voter so that he can be thereby identified, shall be void and shall not be counted. As I say, I have to deal with the ballots from that standpoint, counting for the by-law all ballots properly cast, within the meaning of the statute; and against the by-law, all ballots properly cast against the by-law. I then ascertain whether the by-law has been carried by a majority of the persons voting, as evidenced by the ballots I have thus counted. Unless a majority has been obtained for the by-law, it is not necessary to go further,—if a majority has been obtained for the by-law, then I have to ascertain whether the total vote counted for the by-law represents 60 per cent. or three-fifths of the "electors voting upon said by-law." and to ascertain what electors have voted for the by-law involves the determination of the second legal question which is raised before me. Can a person be said to have voted for the by-law who has not voted in such a way that the recorded expression of his vote as provided by the statute as the vehicle and record upon which his vote can be counted, and the only way in which his vote can be counted, can he be said to have voted if that record is defective in any way which under the statute prevents it from being counted as a vote either for or against the by-law. In other words, can I declare that to be the law which presents such an extraordinary anomaly that a ballot paper may be rejected as not evidencing a vote given for or against the by-law, and that that same ballot paper shall be counted as evidencing a vote given to make up the number of electors voting on the by-law? I am unable to feel that the legislature ever contemplated any such extraordinary anomaly, and that the spirit of the legislation was that in order to carry the by-law, there must be a majority of three-fifths of all those persons who have validly and by the means provided by law for evidencing their vote, namely, the ballot so marked the ballot and so voted in marking the ballot as that they have given a legal ballot, and have not merely

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he mere formality of voting. The result of
l be, that in ascertaining whether the three-
d for the by-law, I would take the sum of
perly marked for the by-law, the sum of the
marked against the by-law, add these two
obtaining the number of persons who had
properly voted, legally voted upon the by-
that total, ascertain whether the number
for the by-law represented three-fifths of
I did so find, I should have to report that
nicipality, and the by-law would be passed
not, then the by-law would have to be de-
ied.

ner or not those ballots which were depos-
without any mark on them at all except
he deputy returning officer, I have not the
ion in saying that they could not be counted
he factors to be taken into consideration in
ether the three-fifths majority has been ob-
The elector has not voted, has not expressed
one nothing but simply say "I decline to
sence in the polling booth, his accepting
is going behind the screen with an appar-
marking the ballot, carries him no further
never presented himself at the polling booth
point I have no hesitation whatever.

her ballots, where the voter has apparently
ctual attempt to record his vote so that
upon the ballot would make it countable
as done something which under the statute
ballot, I have entertained some difficulty,
better opinion is the opinion I have reached.

informed that in the counting by the de-
officers of the ballots cast as to this by-law,
ejected ballots. That being the case, in the
e taken of the law, it occurs to me that a
t of the ballots has become almost un-
unless either party for any reason desires
to check and verify the operations of the
the returning officer in reaching their con-
claration of the returning officer as to the
would stand, and the by-law would be passed

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ly the municipal council accordingly. If, however, either o the parties concerned in this by-law either for or against fo any reason desire a physical recount, I shall be glad t enter upon it and proceed in due course. If the matte stops here, looking at the fact that it is a new statut about which reasonable doubt as to the meaning to be give to it has arisen, I think there should be no costs to o against either party. If, however, an actual physical r count is demanded by either party, then I reserve the whol question of costs until giving my final report.

[See Re Swan River Local Option By-law, 3 W. L. R 546.]

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THE

ARIO WEEKLY REPORTER

(To and Including February 9th, 1907).

TORONTO, FEBRUARY 14, 1907. No. 5

HT, MASTER. FEBRUARY 4TH, 1907.
RIDGE, C.J. FEBRUARY 12TH, 1907.

CHAMBERS.

COBALT NIPIGON CO. v. McKIM CO.

McKIM CO. v. COBALT NIPIGON CO.

tion of Actions—Conduct of Proceedings — Cross-ions—Time—Diligence—Stay of one Action.

n by the Cobalt Nipigon Co. to consolidate the two

Elliott, for the applicants.
Smith, for the McKim Co.

MASTER:—These are cross-actions on an advertising made between the parties. Each party alleges that has violated the agreement.

obalt Co. issued their writ on 18th December, and s tried to settle. They did not succeed, and the Mc- ssued a writ in January, and delivered a statement This was not done in the first action because it ght that the parties were still attempting settle- . .

admitted that both actions should not be allowed l, but each party wished to have the conduct of the gs.

mith contended that Crossley v. Ferguson, 33 C. L. cided that the motion was premature, and that the . had lost their priority.

k, however, that what was said there as to the mo- g premature only applied to that particular case.

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Here there is no doubt that both actions arise out of the o contract. There is no complaint on this point.

In Girvin v. Burke, 13 P. R. 216, it was said that "t main indicia which determine who is to have the carriage the proceedings (are) which action was first begun? Up whom does the chief burden of proof lie? Which is the mo comprehensive in its scope?"

Here none of these apply except the first, and it seem right to decide the question on that ground. In Girvin Burke, it will be seen that (as here) the later action had ou stripped the earlier one. But no weight was apparently give to that fact, and the conduct of the proceedings was given the plaintiff in the earlier action, although the second actio was ready for trial and would have come on a month befo the first, for which indeed notice of trial had not actually bee given.

It would seem to be the better course here to stay th second action, and let the whole issue be tried in the fir action. The costs of the motion to be costs in the cause, an those of the second action should abide the result of the fir action.

The plaintiffs should undertake to proceed with all po sible expedition, and the case should at once be set down f trial without waiting for the three weeks to elapse, if defe dants so desire.

Upon appeal the order of the Master was reversed FALCONBRIDGE, C.J.; the conduct of the proceedings w given to the McKim Co.; and the first action was staye costs in the cause.

TEETZEL, J. FEBRUARY 5TH, 190

CHAMBERS.

STONE v. DAVIES.

Discovery—Examination of Plaintiff—Issue of Appointme for, before Service of Statement of Defence—Service Statement of Defence on same Day—Fraction of Day Rules of Court.

Appeal by plaintiff from order of Master in Chamber ante 187, requiring plaintiff to attend for examination f discovery, and holding service of appointment regular.

E. W. Boyd, for plaintiff.

A. Cohen, for defendant.

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:L, J., allowed the appeal and set aside the appoint-
he examination of plaintiff for irregularity. Costs
e.

FEBRUARY 5TH, 1907.

C. A.

STEPHENS v. TORONTO R. W. CO.

ıle of—Action in High Court—Payment into Court
efence of Sum within County Court Jurisdiction—
ınce—Rule 425.

by defendants (by leave) from order of a Divi-
rt affirming an order of a Judge in Chambers af-
ruling of a taxing officer that plaintiff was entitled
the High Court scale. Plaintiff sued in the High
damages for personal injuries, and defendants paid
Court, which plaintiff accepted, and thus ended the

peal was heard by MOSS, C.J.O., OSLER, GARROW,
, MEREDITH, JJ.A.

McCarthy, for defendants.

Parmenter, for plaintiff.

J.A.:—This was an action to recover damages for
ıused by the defendants' negligence. The defen-
into Court $150 in respect of all causes of action,
aintiff took the money out of Court in satisfaction
ne, and taxed his costs, against objection, on the
e High Court. The ruling of the taxing officer was
ıccessfully by a Judge and by a Divisional Court.
dants appeal, contending that the view of Rose, J.,
v. Toronto Electric Light Co., 12 P. R. 58, should
d in preference to that expressed by a Divisional
Babcock v. Standish, 19 P. R. 195, inasmuch as the
aid into Court and accepted in satisfaction shewed
of action to have been one within the jurisdiction of
y Court.

ot think it necessary to discuss the cases referred to,
estion whether the construction of the Rules which
iff contends for should be rejected because it tends

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to promote litigation by encouraging plaintiffs to make extravagant claims, or should be adopted because it encourages compromises and tends to put an end to litigation. Upon the plain language of the Rules, I think Babcock v. Standish was well decided.

Rule 425 expressly provides that when the plaintiff takes out money in satisfaction of all the causes of action he may tax his costs of the action and sign judgment therefor, unless the defendant pays them within 48 hours after taxation.

If there is no Rule of Court which limits the scale of costs taxable in that particular case, the plaintiff must be entitled to costs on the ordinary scale applicable to the Court in which the action is brought, for there is nothing in Rule 425 which restricts him to anything less.

The defendants point to Rule 1132. That Rule, however, is clearly confined to cases in which judgment is entered for the plaintiff after a trial, whether by a Judge or by a jury, and for some amount awarded by the judgment, and Rule 1133, which they also rely upon, only provides for cases in which judgment is entered without a trial where the amount of or the relief awarded by the judgment prima facie appears to be within the jurisdiction of an inferior Court. But where money is paid into Court and accepted and taken out of Court in satisfaction under Rules 419 to 425, there is no judgment for anything but the costs, and not even for them if the defendant pays them within 48 hours after taxation. The amount paid in is offered in satisfaction and accepted in satisfaction of the demand sued for, and the settlement and disposition of the action thus rests not upon the judgment of the Court, but upon the agreement of the parties, and Rule 425 is the only one which provides for the costs recoverable in that particular case.

Order XXX., Rule 4, of the Irish Judicature Act is similar in terms to our Rule 425, and in McSheffery v. Lanagan (1887), 20 L. R. Ir. 528, the question now under consideration was dealt with by the Court of Appeal and decided as we now decide it.

The case invites no further observations of any kind, and the appeal must therefore be dismissed with costs.

MOSS, C.J.O., GARROW and MACLAREN, JJ.A., concurred.

MEREDITH, J.A., also concurred, for reasons stated in writing.

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FEBRUARY 5TH, 1907.

C. A.

LOVELL v. LOVELL.

Supreme Court of Canada—Extension of Time for Appealing—Terms.

by defendant to extend time for appealing to the ourt of Canada from the judgment of the Court (8 O. W. R. 517) in favour of plaintiff in an limony, defendant proposing to apply to the Su- rt for leave to appeal, if necessary, the Court of ing refused leave, ante 227.

Vatson, K.C., for defendant.

, K.C., for plaintiff.

URT (MOSS, C.J.O., OSLER, GARROW, MACLAREN, JJ.A.), made an order extending the 60 days al- ppealing to the Supreme Court, but only in such enable defendant to apply to the Supreme Court manner and to the same extent as he might have application to this Court for leave to appeal to e Court had been disposed of before the expiration days. The terms of the order to be settled in

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GE, C.J. FEBRUARY 6TH, 1907.

WEEKLY COURT.

LATIMER, LATIMER v. LATIMER.

ruction—Personalty—Absolute Bequest to Wife, d by Bequest to Take Effect on Death of Wife.

by plaintiffs for a summary order declaring the interests of the parties in the personal estate of mer, deceased, and for administration of the

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By the will of the deceased he devised and bequeathed al his real and personal estate to his wife, her heirs and assigns absolutely forever, and then went on to provide that at he death all his real and personal estate should be divided amon his children, excluding one. The whole estate of the testato consisted of the amount secured by a mortgage. The wil was not drawn by a solicitor.

F. H. Honeywell, Ottawa, for plaintiffs.

A. F. May, Ottawa, for defendants.

FALCONBRIDGE, C.J., held that the testator plainly in tended his wife to take everything absolutely, and the subse quent clause was to be read as referring to her death durin his lifetime, or to the disposition of whatever should be lef at her death if she survived him. Plaintiff Francis Latime was entitled to pass his accounts as executor and be dis charged if he so desired.

Order accordingly. Costs of all parties out of estate— costs to plaintiffs only as of motion to Court for constructio of will and advice of Court.

CARTWRIGHT, MASTER. FEBRUARY 8TH, 190

CHAMBERS.

COUNTY OF DUFFERIN v. COUNTY OF WELLING TON.

Pleading—Reply—Motion to Strike out—Departure—Inco sistent Pleading.

Motion by defendants to strike out part of the reply.

Featherston Aylesworth, for defendants.

J. N. Fish, Orangeville, for plaintiffs.

THE MASTER:—The statement of claim asks for a d claration that defendants are jointly liable with them fo the erection and maintenance of all bridges over stream forming or crossing the boundary line between the tw

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thout regard to the width of the same, and with respect to one lately made. Defendants ne last named work was done by plaintiffs with-nsent, and is only a culvert 3 feet wide; that ve asked them to pay half the cost of this work; s is the only dispute between them.

o deny that the culvert is a bridge within the the Municipal Act, 1903, sec. 617 (1), and say , even if it is, the proportion of the cost payable nty is to be determined otherwise, and they demurring to the statement of claim.

y states (1) that plaintiffs "seek only to have that the structure in question is . . . a a stream crossing a boundary line between two In the 2nd paragraph plaintiffs allege that the stion was executed after ample notice to and owledge and concurrence of defendants; and in agraph that the condition of the former struc- was a bridge of upwards of 10 feet in width, at the matter could not be delayed, and that if are not otherwise liable, then "an agency of se from the circumstances, and the defendants l from repudiating the contract so made in y the plaintiffs on behalf of themselves and the or the construction of the bridge in question."

ndants now move to strike out paragraph 1 of s being in contradiction of the statement of nconsistent therewith, and also with the rest itself, or to strike out paragraphs 2 and 3 onsistent with paragraph 1, and with the state-m.

ght of the argument it does not seem that the ctionable.

paragraph may be open to verbal criticism, but ough if taken in conjunction with the 3rd para- statement of defence. The words "seek only" en as referring to the structure in question and to. Then the other paragraphs are in answer to ns of the defendants of the work having been t their knowledge or consent. These paragraphs the particular bridge and have no concern with declaration asked for. Even as to the bridge in plaintiffs are not asking for payment, the amount

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of which will be determined by arbitration if the defendants are held liable.

The defendants will have 10 days in which to put in a further plea if they so desire.

The costs of this motion will be in the cause.

CARTWRIGHT, MASTER. FEBRUARY 8TH, 1907.

CHAMBERS.

HODGSON v. BIBLE.

Particulars—Statement of Claim — Seduction — Times and Places—Death of Plaintiff's Daughter.

Motion by defendant for better particulars of the statement of claim in an action for seduction.

T. J. W. O'Connor, for defendant.

C. A. Moss, for plaintiff.

THE MASTER:—The statement of claim alleges that defendant engaged as a domestic servant plaintiff's daughter, who was 13 or 14 years old; that while in service she was seduced by defendant, and gave birth to a child on 4th November, 1906, and as a result thereof died.

Defendant has demanded particulars of the times when and places where the alleged wrongs were committed. In answer plaintiff says that it was "at defendant's farm house, and at other places in the near vicinity thereto, at present unknown to the plaintiff, and the times were in the month of February, 1906, but the exact dates are unknown to the plaintiff. The plaintiff reserves the right to give further and better particulars."

The defendant, who has not pleaded, moves for further and better particulars before doing so.

The motion was supported by A. v. B., 7 O. L. R. 73 (S. C., sub nom. Gambell v. Heggie, 2 O. W. R. 1174.) But here defendant has not filed any affidavit denying the seduction, while on plaintiff's behalf an affidavit has been filed as in Robinson v. Sugarman, 17 P. R. 419. This the plaintiff

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., supra, declined to do, though given the oppor-
here too the plaintiff's daughter was alive, and no
been born, so that it was important to defendant
hat date would be assigned before he put in his
nd was subject to examination for discovery. The
n the other hand, was perfectly able to find out
ulars from his daughter, and there was no reason
ould be unwilling to give the particulars asked
facts here are very different, and not likely to
epeated.

the special circumstances, therefore, I think the
ould not be granted. The times and places on
ntiff must probably rely are given with sufficient
ty to allow defendant to deny the fact alleged
m.

otion is dismissed, without prejudice to its re-
r discovery, unless plaintiff at least 4 weeks be-
rial has furnished further particulars to the de-
satisfaction. Costs in the cause.

MASTER IN ORDINARY. MAY 26TH, 1906.

MASTER'S OFFICE.

PLENDERLEITH v. PARSONS.

— Redemption—Reference—Irregular Proceedings
ount—Rents Collected by Solicitor and Misappro-
d — Agent of Owners of Equity of Redemption—
gee in Possession—Agent—Disbursements for Re-
-Trade Discount—Fraud—Person Chargeable with
t—Rate of—" Liability."

nce in a mortgage action.

lop. for plaintiff.

Irwin, K.C., for defendant.

MASTER :—The judgment in this action is the usual
edemption action—with some special directions as
nd other matters.

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The observations of Lord Esher, M.R., in White v. Cit of London Brewery Co., 42 Ch. D. at p. 242, may be appro priately applied to the proceedings in this case, which I fin have been irregularly conducted and unnecessarily prolonged "Everything in these proceedings was done in the wors form possible; and perhaps in strictness the case ought to b tried by us according to the ill-form in which it is brough before us. But we do not like to determine people's right by the ill-form in which they have conducted their proceed ings, if we can get at the substance of the case. If we wer to deal with the case according to strict form, I apprehen that the appellant would have no chance at all, and woul not before the learned Judge below have got so much as h has."

The first question to be considered is as to the agency o a solicitor, one T. W. Howard; the plaintiff contending tha he was the agent of the original mortgagee, the late Matthew Parsons; and the defendant contending that he was the agen of the executors representing the Plenderleith estate. Th material evidence as to this contention is contained in the evi dence of one Brown, one of the executors, the evidence o the defendant, and the entries in the books of account kep by T. W. Howard, in which the account is entered from 189 to 1897 as "Mrs. Plenderleith's estate, Bishop street houses," and in which various expenses and payments are entered fo repairs, taxes, water rates, and such entries as "Parsons in terest," "Paid Parsons account of interest," and simila entries.

The evidence of the plaintiff's witness Brown, when ex amined by the plaintiff's solicitor on these disputed points, i material:—

"Q. Mr. Howard was appointed by you to do certai things in connection with the houses of the (Plenderleith) estate? A. Yes.

"Q. Tell us shortly what? A. I just appointed him t collect the rents and get tenants for the houses.

"Q. Have you entries in the books of the estate? A Howard kept the books.

"Q. Do you mean to say that since you handed that (book) to Howard you have not kept any accounts of the estate? A. I kept none because he was attending to it, and he collected the rents.

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er handing over this book to Howard did you keep of the moneys received from Howard or moneys d to the Plenderleith estate? A. I received no Howard; he had to pay the moneys out to the s fast as he got it in—paid out in taxes and in- mortgage."

ny questions he replied:—

I understand you to say that Howard was ap- gent of the executors to collect these rents and account of the mortgage? A. Yes, sir.

pay them on account of the mortgage held by . Yes.

there another executor besides you? A. Yes, I.

you and your wife revoke his authority to collect r these rents on account of the mortgage? A. that authority still until about—he dropped out

ant to know what you did; did you and your wife, and executrix of the Plenderleith estate, ever gency which you have described to me? A. No, it formally.

acted for you up to the time he was sent to prison, A. Yes, sir."

her evidence shews that Howard was convicted al charge in September, 1895, and sent to the on.

ntiff's contention that Howard was appointed the original mortgagee, Matthew Parsons, is based ibits, Nos. 12, 13, and 15, dated 11th January, gned "M. M. Parsons, per W. A. P." To num- ded in a different ink "Atty.," which the defen- was not to the document when he signed it.

ocuments purport to be notices to the tenants of in question requiring them to attorn to Matthew mortgagee, and they further purport to appoint ard as his agent to demand and collect all rents or that might thereafter accrue, in respect of emises.

the parties having asked the defendant as to his sign his father's name to them, I asked him: father authorize you, if it is your writing, to sign

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a paper of that kind? A. My father didn't authorize me
sign a paper of that kind."

And when re-examined later on he was asked: "D
your father authorize you to have Howard take possession
his property? A. He didn't. I never knowingly gave Ho
ard possession." But in regard to other solicitors he sa
(p. 153): "You say your father instructed his solicitors,
& W., to take proceedings on this mortgage? A. Yes, throug
me."

"Q. Were you going to B. & W. on your father's instru
tions? A. On my father's instructions, yes."

No argument was advanced by either party as to t
validity or invalidity of these documents, so signed by t
defendant M. Parsons per "W. A. P.," although they wou
ordinarily bring up for consideration two principles of ge
eral law; one that involved in the maxim that "delegat
authority cannot be redelegated;" and the other that i
volved in the doctrine that it is a breach of duty for an age
(one in the position of W. A. Parsons as agent for his fath
M. Parsons) to delegate his agent-powers to a sub-agent wh
is acting on behalf of a third party, whose interests are a
verse and antagonistic.

The first maxim is defined in De Bussebe v. Alt, 8 Ch.
at p. 310: "As a general rule, no doubt, the maxim 'del
gatus non potest delegare' applies so as to prevent an age
from establishing the relation of principal and agent betwe
his own principal and a third person; but this maxim wh
analyzed imports that an agent cannot, without authori
from his principal, devolve upon another obligations to t
principal which he has himself undertaken to personally fu
fil; and that, inasmuch as confidence in the particular pers
employed is at the root of the contract of agency, such a
thority cannot be implied as an ordinary incident in the co
tract." The second proposition is explained in Salomons
Pender, 3 H. & C. 639: "The rule is founded upon the pla
and obvious consideration that the principal bargains, in t
employment of an agent, for the exercise of the disinterest
skill, diligence, and zeal of the agent for his exclusive benefit
And also that the rule as to the non-delegation of power
an agent is that such agent cannot delegate the authority
his principal where personal confidence is reposed in his (t
agent's) skill and honesty. See Wright on Principal a
Agent, p. 163.

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Then, in addition to these rules of law, there are the facts t Howard (excepting the Carter case) never acted upon se documents, but continued to keep the accounts of the nderleith estate in his books in the same form in which had been accustomed to keep them prior to these docu-nts, and that he rendered accounts to Brown, the executor resenting the Plenderleith estate; but none to Parsons, mortgagee.

It must be kept in mind, in dealing with the responsi-ties of mortgagees in possession, that it is the laches of mortgagor in not performing his covenant for the repay-nt of the mortgage money and interest, that lets the mort-gor's lands lapse into the hands of the mortgagee; and refore, where the mortgagee enters into possession, he is y accountable for what he actually receives, and is not ind to take the trouble of making the most of another son's property: Cook on Mortgages, 3rd ed., p. 345. And he will not be required to account for more than the actual ts and profits received by him, unless it can be proved that has been guilty of "wilful default," which may be said to another term for "gross negligence."

But the act of a mortgagee going into possession of the rtgaged property must be such as clearly indicates that displaces, for the purpose of realizing his security, the rtgagor from the control, dominion, and management of mortgaged property, and that he takes the rents in such way as to take out of the hands of the mortgagor the busi-ss and the duty of collecting the full rents, if the tenants uld pay them, as a diligent owner of the property would.

This proposition was illustrated in the case of Noyes v. llock, 32 Ch. D. 53, which has some points of resemblance this case. Lord Justice Cotton said: "A great deal of gument here turns upon equivocal use of the words 're-ipt of rents,' because it was said that, as the mortgagees ve got, or tried to get, the whole amount that was paid for nts, they are in receipt of the rent. They are in receipt of e sum of money the amount of which was determined by the nts received, but they were not in the receipt of the rents as tercepting between the tenants and the mortgagor, or his ent, the rents which were payable for the land by the nants, or as part of the management of the estate under-ken by them. . . . But it is said here that Mr. B. was ppointed agent by the mortgagees, which put an end to his

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agency for the mortgagee Mr. Noyes; and that this was s
a taking possession as to make them responsible to the m
gagor and put them into the position of mortgagees in
session;" but he held that it was not. And Lord Jus
Bowen added: "Where an estate is let to tenants, the m
gagee does not enter upon actual occupation of the dem
premises . . . But only, as it seems to me, if he
something which goes beyond the mere receipt of sum
money to which the rents and profits may amount, and rea
a point at which he displaces, for the purpose of realizing
security, the mortgagor from the control and dominion
the reversion of the estate which is demised. Unless the
minion and control is taken in that sense, the mere recei
the produce of the management may be taken by the m
gagee, and yet he may stop short of taking the manager
himself. He may take the rents; that is not enough, u
he takes the rents in such a way as to take it upon him
and out of the hands of the mortgagor, the business and
duty of collecting and being diligent in that respect."

After the imprisonment of Howard, some of the ten
paid their rents to the solicitors of the assignee of How
who also claimed to be the solicitors for the executors of
Plenderleith estate; and whose letter of 25th October, 1
addressed to Brown as executor of the Plenderleith es
supports such claim: "Dear Sir:—Re T. W. Howard es
—In this matter we have had an interview with Mr. Par
who is the mortgagee of the Bishop street property, w
was managed for yourself and the Plenderleith estate.
essential in your interests that you should see us that we
take proper measures to avoid further loss on your be
We are acting as solicitors for the estate, and have the co
and custody of all papers."

On the evidence and guided by the principles of lav
plicable to that evidence, I find that Howard was no
agent of the late Matthew Parsons, the mortgagee of this
perty, but that he was, and continued up to the date o
imprisonment, the agent of the executors of the Plender
estate, and that as such agent he collected the rents, mar
the property, paid taxes and certain sums for repairs an
interest to Parsons, the amount of which (after paymen
above) "was determined by the rents received" by him
that Parsons never interfered with his agency or ma
ment.

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. I further find that the late Matthew Parsons did in
y, 1898, exercise his right as mortgagee, and did take
the hands of the executors of the Plenderleith estate,
iness and the duty of collecting the rents, and that he
executor are accountable for the rents received by
nt Carr from that date, except for the time when the
f's present solicitor wrongfully interfered with the
nt's tenants in July, 1904, and rented the premises
tenants as indicated in exhibit No. 36, and as shewn
evidence of Mr. B. M. Jones, and that, as against such
e should be allowed for permanent and other repairs,
nd water rates.

other matters remain to be disposed of. It appears
e agent Carr was allowed a trade discount on his dis-
ents for repairs. This discount cannot be allowed in
ccounts, on the authority of Turnbull v. Garden, 20
. S. 218.

other matter is, that—recognizing the principle of the
in Henderson v. Williams, [1895] 1 Q. B. 521—I
he present defendant, having in violation of his duty
t of the mortgagees, and without authority from his
whose name he wrongfully signed to exhibit No. 10,
Mr. T. W. Howard to present to the County Court
in the name of Matthew Parsons as such mort-
and to obtain an order in the Carter case, and ulti-
to obtain from Carter a note for $45, should be charged
e accounts with the amount of that note. The rule
quoted from the case of Root v. French, 13 Wend.
ted in the judgment referred to: "When one of two
nt persons must suffer from the fraud of a third, he
uffer who, by his indiscretion, has enabled such third
to commit the fraud." So the amount stated in Par-
affidavit in the former foreclosure proceedings is to
d binding on him.

e mortgage in this case is dated 16th February, 1884,
,300, with interest at 7 per cent., payable in 5 years,
st payable half-yearly on the 16th August and 16th
ary in each year, adding that interest on arrears is to
e principal and to bear interest at the rate aforesaid
the time the same should become payable, until pay-
The 5 years carried the mortgage to 16th February,
but I think any interest paid at the covenant rate of
cent. cannot now be taken into account or recovered

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back or applied in reduction of the mortgage debt: Hutton Federal Bank, 9 P. R. 568. From the date of the last pay ment of interest, the rate of interest (unless paid at th covenant rate) must be computed at 6 per cent., as provide by R. S. C. 1886 ch. 129, sec. 2. The plaintiff contends tha the Act 63 & 64 Vict. ch. 29, which came into force on 7t July, 1900, operated to reduce the rate of interest to 5 pe cent., and that the proviso does not apply which says, "Pro vided that the change in the rate of interest in this Act sha not apply to liabilities existing at the time of the passing o this Act," and the case of British Dominion Loan and Agenc Co. v. Farmer, 24 C. L. T. Occ. N. 278, a Manitoba case, i cited in support of that contention. I cannot follow tha case, having in Re P. R. Cumming Manufacturing Co. (Ban of Ottawa's Claim), 6 O. W. R. at p. 583, construed the term "liability," in the Bank Amendment Act of the same session ch. 26, secs. 18 and 19, and held that it included "debt" an had a broader meaning than that term. The term "liabi lity" occurred in the Bank Act, 1890, sec. 65, in the Bills o Exchange Act, 1890, sec. 32, in the Winding-up Act, R. S. C 1886, ch. 129, sec. 2, sub-sec. (f), and secs. 44 and 45, an various other Dominion Acts, and its equivalent is associate with it in the term "debts and liabilities" in R. S. O. 189 ch. 129, sec. 37; and a definition of the term "liability" wil be found in sec. 3 of the English Bankruptcy Act, 1869, an was thus commented upon by Lord Justice Bowen in Linto v. Linton, 15 Ch. D. at p. 247: "A liability within that sec tion must be something the value of which is capable of bein estimated in some way or other."

I must, therefore, hold that the debt due on this mortgag at the passing of the Interest Act of 1900 was a liability ex isting at the time of the passing of that Act, and that th interest should be computed at the rate of 6 per cent. from th time mentioned above.

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THE

NTARIO WEEKLY REPORTER

(To and Including February 16th, 1907).

IX. TORONTO, FEBRUARY 21, 1907. No. 6

FEBRUARY 11TH, 1907.

DIVISIONAL COURT.

ROBINSON AND VILLAGE OF BEAMSVILLE.

ipal Corporations—Local Option By-law — Motion to uash—Irregularities—Substantial Compliance with Sta-le—By-law Good on its Face—Delay in Moving—Dis-tion—Refusal to Quash.

peal by Robinson from order of MULOCK, C.J., 8 O. W. , dismissing a motion to quash a local option by-law.

Haverson, K.C., and C. H. Pettit, Grimsby, for ap-.

E. Raney, for the village corporation.

E COURT (MEREDITH, C.J., MACMAHON, J., TEETZEL. smissed the appeal with costs.

FEBRUARY 11TH, 1907.

DIVISIONAL COURT.

LIVINGSTON v. LIVINGSTON.

ence—Local Master—Employment of, as Solicitor for arty, pending Reference — Disqualification — Setting side Proceedings—Provision that Part of the Evidence Taken shall Stand—Costs.

Appeal by defendant from order of ANGLIN, J., 7 O. W. 830, on motion by plaintiffs, setting aside the reference to

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the local Master at Berlin and all proceedings thereupon ha before him, on the ground of the acceptance by the firm c solicitors in which the local Master was a partner of a r tainer from defendant for some non-contentious business i the Surrogate Court of Waterloo, and directing a referenc to another referee, with costs to be paid by defendant.

The appeal was heard by FALCONBRIDGE, C.J., BRITTON J., RIDDELL, J.

S. H. Blake, K.C., and J. H. Moss, for defendant.

W. Nesbitt, K.C., and H. S. Osler, K.C., for plaintiffs.

FALCONBRIDGE, C.J.:—I have nothing to add to the ver careful judgment of my brother Anglin. In affirming it, venture to say that, in my humble opinion, the standar has not been pitched too high by the cases which ampl support his conclusions, and I also venture to hope tha judicial officers and others will find no difficulty in living u to it.

We have delayed the pronouncing of this judgment, no by reason of any doubt being entertained as to the proper di position of the appeal, but in order to consider what, if any thing, could be saved to the parties out of the wreck. M brother Riddell and I are of opinion that all that can be don in that direction is to order that the evidence taken on con mission, the work of the accountants, and the documentar evidence, shall stand, and the costs of these items shall be re served from the general order and shall be dealt with on th motion for further directions after the new referee sha have made his report.

In all other respects the appeal will be dismissed wit costs.

BRITTON, J., agreed that the appeal should be dismisse with costs, for reasons stated in writing. He was of opinio that all the evidence already taken should be allowed stand.

RIDDELL, J., agreed with the disposition of the appe made by the Chief Justice, for reasons stated in writing.

The following cases were referred to: Allinson v. Ge eral Council of Medical Education, [1894] 1 Q. B. 750; Le

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43 Ch. D. 366; Regina v. Allen, 4 B. & S. at p.
v. Anderson, 14 A. R. 213; In re Notter, L. R.
'; Vineberg v. Guardian Fire and Life Assurance
R. 293; McLean v. Cross, 3 Ch. Ch. 432; Bige-
low, 6 P. R. 124.

T, MASTER. FEBRUARY 12TH, 1907.

CHAMBERS.

BOYD v. MARCHMENT.

-Production of Documents — Business Books of nt—Examination of Defendant—Materiality of ion Sought by Plaintiff.

by plaintiff for an order requiring defendant to er and better affidavit on production of documents ter to attend at his own expense for further ex- or recovery.

ontgomery, for plaintiff.

ones, for defendant.

ASTER:—Plaintiff claims damages for injuries to d his carriage caused by defendant's servants ecklessly and negligently" on Rose avenue, in the onto.

fences are: (1) want of reasonable care on the intiff; and (2), in the alternative, that the colli- mere accident for which defendant is not liable.

examined defendant says he keeps books which en he employs and the work they do. These books with him, and, on his counsel's advice, declined to em. He gave the names of the men who were aggon at the time of the accident, and said they ave been going faster than a man could walk; he t his books will tell about what the weight of the ut he could not give it from memory. The pro- these books was refused, and the examination was to allow this motion to be made.

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On 30th January defendant's solicitors wrote (withc prejudice) that defendant's team in question was comi from a house on Amelia street, and "that the weight the load and the waggon together would be not less than tons." But they took no notice of the request to have t books produced. Plaintiff was not satisfied with this, a the motion was argued on 8th instant.

It was contended that the weight of the load was imm terial, as there is no defence here such as that which prov successful in Wills v. Belle Ewart Ice Co., 12 O. L. R. 5 8 O. W. R. 331.

On the other hand, it was argued that if the weight w anything like 3 tons, plaintiff would find it difficult to esta lish any furious driving.

In this view, it seems that plaintiff should have the p duction asked for, and further examination if it seems nec sary. To find out what house on Amelia street the team w coming from, and what the weight of the load was, m assist plaintiff—and this is a sufficient reason for maki the order asked for. See Bray's Digest of Discovery (190 p. 46.

Plaintiff's case rests on recklessly and negligently drivi horses and conveyance. Defendant in his depositions den that this was probable. It clearly becomes material to f out how this was as a fact, and plaintiff is entitled to h such discovery as may assist in shewing the truth. S pose the books shew that the load was only 1 ton inst of 3, or even less. That would be extremely helpful to pla tiff. Assume, on the other hand, that it is shewn that weight was such that defendant is right in what he says the rate at which the team was moving. Then it may necessary for plaintiff to consider whether his better cou will not be to discontinue on the best terms he can make w defendant. . . .

[Reference to Odgers on Pleading, 5th ed., pp. 261, 2 Attorney-General v. Gaskell, 20 Ch. D. 519; Hennessey Wright (No. 2), 24 Q. B. D. at p. 447.]

If plaintiff is satisfied with seeing the books, no furt affidavit need be filed.

The costs of the motion must be to plaintiff in any ev

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T, MASTER. FEBRUARY 12TH, 1907.

CHAMBERS.

BURNS v. TORONTO R. W. CO.

Surgical Examination of Plaintiff—Action for l Injuries—Rule 462—Order before Delivery of .

by defendants for order for surgical examination in an action for personal injuries before delivery t of defence and to extend the time for delivery of until a week after the surgeon's report.

IcCarthy, for defendants.

ald (Curry & Co.), for plaintiff.

ASTER:—Rule 462 is found under the head of dis- must be applied in the same way as Rule 442. . London Street R. W. Co., 18 P. R. 370, Osler, p. 372), of the application of this Rule 462, "It nation for discovery only."

rged in support of the motion that its object was efendants to pay into Court such amount as they sufficient compensation. This they wish to do nitting liability. But they can do it just as well use is at issue, as was done, e.g., in Stephens v. W. Co., 7 O. W. R. 39. The extra costs will be ly trifling.

e motion might, perhaps, have a different result was admitted, there does not seem to be power order asked for here when opposed. In the case h an order was made on 27th June last (Stephens R. W. Co.), I think the order must have been y consent.

iff consents, an order may issue after defence to save any further motions. In that case costs on will be to plaintiff in any event.

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ANGLIN, J. FEBRUARY 12TH, 190

WEEKLY COURT.

RE IANSON.

Will—Construction—Devise—Tenants for Life—Remaind to Children—Per Stirpes or per Capita—Preceding G of Income per Stirpes—"Hereinbefore Devised to them —"Equally"—"Between"—"Or their Legal Represent tives."

Motion by Thomas W. Keizer and other adult children Mary Keizer for an order determining a question arisi under the following clause of the will of William Ianso deceased:—

"At the death of my said wife I give unto my two daug ters Mary Keizer and Sarah Long the east half of lot numb 20 in the 2nd concession of the township of York west Yonge street to receive the rents and profits of the sa equally during the natural lives of my said daughters and the death of either before the other the children of such d ceased daughter to receive their proportion of said rents profits of said lands during the life of my said survivi daughter as the case may be and at the death of both said daughters Mary and Sarah that the land hereinbefore d vised to them be sold and the price thereof equally divid between the children of my said daughters Mary and Sa or their legal representatives."

Mary Keizer and Sarah Long having both died, the qu tion presented for determination was whether, under concluding words of the devise quoted their children took stirpes or per capita. Sarah Long, who predeceased her ter, left but one child. The descendants of Mary Kei were comparatively numerous.

R. J. Gibson, for the applicants.

M. C. Cameron, for the infant descendants of Mary Kei

S. H. Blake, K.C., for Mrs. Bradley, only daughter Sarah Long.

M. S. Mercer, for the Toronto General Trusts Corporati administrators with the will annexed.

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, J.:—While conceding that under a devise to the A. and of B., in the absence of sufficient indication intent, the children of both take share and share apita, Mr. Blake contends that by the language in gift to the children of Mary Keizer and Sarah uched such contrary intent is sufficiently shewn; e preceding stirpital disposition of income renders unmistakable.

nceded by Mr. Gibson and Mr. Cameron that upon of Sarah Long her daughter became entitled to of the income which the mother had enjoyed; but hat the disposition of the corpus, made, they main- guage which, taken by itself, plainly contemplates per capita, should be controlled by the prior sposition of income.

ch a disposition of income will not warrant the onstruing as stirpital a gift of the corpus, in itself hin the purview of the general rule that under a children of A. and B. as a class the children take is settled by the decision of the English Court of n re Stone, Baker v. Stone, [1895] 2 Ch. 196.

here there is first such a stirpital disposition of in- find in this will, a comparatively slight indica- subsequent words disposing of the corpus of an ntinue that stirpital division will suffice to justify from the general rule, seems the only legitimate from the decision of the same Court in In re Trusts, 31 Ch. D. 685, 33 Ch. D. 98.

en we come to the question whether in any par- such alleged slight indicia of intent that the di- e corpus should be stirpital suffice to take the case general rule, quot homines tot sententiæ. "I am struing one will by another where the language is not identical:" per Kay, L.J., in In re Stone

present case Mr. Blake relies upon the words which n the disposition of the corpus as affording suffi- a of intent that the division should be stirpital — eath of both my said daughters Mary and Sarah nd *hereinbefore devised to them* be sold, and the of be *equally divided between* the children of my ers Mary and Sarah *or their legal representatives.*"

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First, it is argued that the words "hereinbefore devis to them" indicate that the testator's idea was that by t preceding gift to his daughters he had in effect divided in moieties, for the benefit of his two daughters and their r spective families, his entire interest in the farm. The words do not convey that idea to my mind. They seem be rather the loose and inaccurate reference of an unskill testator to the previous gift of income to his daughters, a indicate—so far as they indicate anything—that it wou be a mistake, in the case of this testator, to credit him w a very keen appreciation of the niceties of language.

Then follow the words "equally divided between." B cause the word "equally" precedes the gift to the gran children, and because the word "between" rather th "among" follows the word "divided," it is contended th intent to divide per stirpes is almost conclusively shew and reliance is placed on the decision of Pearson, J., in re Campbell's Trusts, 31 Ch. D. 685, and the judgment Joyce, J., in In re Walbran, [1906] 1 Ch. 64. . . Thou his judgment was affirmed in the Court of Appeal (33 Ch. 98), Mr. Justice Pearson's view as to the force and constru tion of the word "equally" is ignored by the Lords Justic who rest their conclusion almost entirely upon the use the word "each," which they deem the equivalent of "r spectively," and indicative of two classes of children rath than of a single class as the objects of the gift of the corpu (But see Fletcher v. Fletcher (1892), L. R. Ir. 9 Ch. 301 To me the view taken by Pearson, J., as to the meaning a effect of the word "equally," seems strained; but, in t absence from the present will of the words "in equal sha and proportions," it need not further be considered. T word is, in my opinion, rather indicative of an intent that t distribution should be per capita: Re Ferguson, Bennett Coatsworth, 25 O. R. 591; Houghton v. Bell, 23 S. C. 498, 507.

The word "between" is etymologically more appropriat used where a division into moieties is contemplated: In Walbran, supra. But this word is so commonly employed the equivalent of "among" that little weight should be tached to its use as indicative of a testator's intent as mode of division. . . .

[Reference to In re Walbran, supra; Hutchinson v. I

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R. 329; In re Stone, supra; Abrey v. Newman,

riod of enjoyment is postponed until the death
g life tenant, and the gift is not "between
but "between the children of my said daugh-
Sarah." See Theobald on Wills, 6th ed., p.
also be noted that the words "share and share
ich the gift of the corpus concluded in In re
ch are lacking in the present will, were like-
in Abrey v. Newman.

s urged that the words "or their legal repre-
substitutional, and that they are a conclu-
of a gift per stirpes: Booth v. Vicars, 1 Collyer
If the corpus were here given to the two
in substitution, to "their legal representa-
uld take in the event of the death of either
v. Vicars and the line of cases of which it is
ld be very much in point. This devise is wholly
eover, the pronoun "their" refers, I think,
ghters Mary and Sarah, but to any child or
ary or Sarah who might be dead at the
ibution, and whose share or shares would
e taken by the legal representatives, substitu-
se, and therefore per stirpes—the stirps in
the deceased child so represented. The words
y said daughters Mary and Sarah" are used
iptive of the grandchildren for whom the tes-
providing. It was these grandchildren whom
mind. It seems much more likely that he
egal representatives of any such grandchild
ceiving the benefit of the bequest to stand in
that he intended it to revert to the repre-
e parents. In reading the relative pronoun
erring to the main subject of the devise, I
olence to the well known maxim ad proximum
relatio nisi impediatur sententia. It seems
y clear that such was the testator's meaning,
ascertainable, is the supreme rule of construc-
to wills. In this view, the words "or their
tives" do not seem to me to at all indicate
there should be distribution among the child-
Booth v. Vicars is, I think, not in point,
er the word "their" should be deemed to re-

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late to the children of Mary and Sarah or to themselves. the legal representatives of the life tenant or life tena should take by substitution the share of a deceased grandcl of the testator, I cannot see how that fact would affect quantum of the share of such grandchild or the mode of d sion amongst the grandchildren.

I therefore find nothing in the form of the gift of corpus indicating an intent that its distribution should stirpital. On the contrary, I find at least two featu namely, the fact that following the provision in favour of life tenants the gift of the corpus is not made between "th children" but "between the children of A. and B." nom atim, and the fact that the distribution of the entire corp has been deferred until the death of the survivor of the tenants, which make somewhat in favour of the view t distribution per capita was intended.

The absence of the word "each," and of anything eq valent to it, from this devise, and the exclusion of the po bility of importing such a word as "respectively" (Smith Smith, 1 Mer. 358), by the careful repetition of the nar of the life tenants in the gift to the children (Abrey Newman, 16 Beav. 431, 434), clearly distinguish this c from In re Campbell's Trusts, 31 Ch. D. 688, 33 Ch. D. so much relied upon by Mr. Blake. Notwithstanding absence from this gift of the words "share and share alik with which the gift of the corpus concluded in In re Sto [1895] 2 Ch. 196, I am of opinion that the decision in t case governs the case now under consideration, so far the construction put upon a devise in one will may be s to govern the construction of a similar devise in anot will, when the terms of both are not in all respects idêntic There is not, in my opinion, in this will enough to justify inference of an intent that the gift of the corpus to children of the testator's two daughters should have a other effect than that given to such a provision under general rule, the strength and the scope of which were w illustrated by its application in the early case of Blackler Webb (1728), 2 P. Wms. 383, and again in Houghton v. B 23 S. C. R. 498.

Costs of all parties should be paid out of the estate; th of the administrators between solicitor and client.

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FEBRUARY 12TH, 1907.

DIVISIONAL COURT.

ROBINSON v. ÆTNA INS. CO.

ssignment of Insurance Policy in Trust to Secure d Future Premiums—Contract for Payment of —Construction—Rate and Mode of Computing In- Interest Act—Application—Statute of Limitations ee—Costs—Subrogation.

by plaintiff and appeal by defendants Minnie Cana- hn Canavan the younger from judgment of BRIT- O. W. R. 949.

McCullough, for plaintiff.

J. Lee, for defendants Minnie Canavan and John ne younger.

Tremeear, for defendants Duff and McBride.

URT (MEREDITH, C.J., MACMAHON, J., TEETZEL, sed both appeals.

FEBRUARY 13TH, 1907.

DIVISIONAL COURT.

ITY OF STRATFORD v. MURPHY.

Corporation—Water Supplied to Contractor—Ac- r Price—Rate Applicable—Quantum Meruit.

by defendant from judgment of ANGLIN, J., at Stratford, in favour of plaintiffs for $322.57.

ion was brought to recover the price of water sup- intiffs to defendant, and used by defendant in the n of certain beds of concrete as a foundation for being made by defendant in the city of Stratford. al contract with plaintiffs.

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The trial Judge found that there was an express agr ment by the defendant to pay for the water which he tained from the plaintiffs; that the tariff item was not app able to work of this kind; that no rate was provided plaintiffs' by-laws applicable to this kind of work; that pla tiffs' recovery must be upon quantum meruit; and he cal lated the amount upon the basis of a charge of 5 1-2 ce per cubic yard of concrete work.

The appeal was heard by FALCONBRIDGE, C.J., BRITT J., RIDDELL, J.

W. H. Blake, K.C., for defendant.

R. S. Robertson, Stratford, for plaintiffs.

FALCONBRIDGE, C.J.:— . . . After perusing and perusing the evidence, I am unable to make up my mind t we can interfere with the judgment appealed from. Defe ant signed an application for the water, agreeing to confo to the established rules, regulations, and by-laws, and to p all rates, rents, and other sums provided thereby. The ma ager of the waterworks swears that he requested defenda to call at the office and make his application for the use water, but defendant never took the trouble to ascertain what rate he would be charged. It is sworn that he w charged at the same rate as other people doing work on t streets, laying sidewalks and so on. A very important e ment in ascertaining the amount of water used is to take in account the waste also. It was only a temporary and exc tional service, and it would not be reasonable for defenda to expect to get the same rates that were charged to ot large consumers. In adopting the Toronto rate, it must borne in mind that the rates of Stratford for other uses very much higher than those in Toronto.

On the whole, therefore, I think that the judgment m be affirmed and the appeal dismissed with costs.

RIDDELL, J., was of opinion, for reasons stated in writi that the item in the tariff fixing a rate of 8 cents per cu yard for concrete applied to this case, and on that foot plaintiffs would be entitled to a larger sum than that awarde but he agreed in dismissing the appeal with costs, say that if he was wrong in his conclusion, the charge of 5

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bic yard was not greater than a reasonable charge on a quantum meruit.

, J., was of opinion, for reasons stated in writ- e amount of the plaintiffs' recovery should be re- 42.52.

dismissed with costs; BRITTON, J., dissenting.

GE, C.J. FEBRUARY 14TH, 1907.

CHAMBERS.

RE HART.

of Estates Act—Sale of Land—Caution—Admin- Consent of Adults—Infants—Official Guardian.

y application by Emerson G. Hart, administrator of his deceased wife, Edith M. Hart, under Con. r an order or direction as to whether the adminis- the only adult interested in the lands of the de- d register a caution without an order or certi- uired by sec. 14, sub-sec. 5, of the Devolution of

aird, for applicant.

arcourt, official guardian.

BRIDGE, C.J.:—The intestate died 12th February, g her surviving her husband, Emerson G. Hart, fant children. Letters of administration were e husband. He registered a caution in March, old the real estate with the consent of the official nder the Devolution of Estates Act. The ques- ed to me under Rule 972 is whether the adminis- the only adult interested in the property, could ution without an order from a High Court Judge ourt Judge, or the certificate of the official guar- uired by sec. 14, sub-sec. 5, of the Devolution of

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Under sub-sec. 3 of the said section, the consent in w
ing of any adult devisees or heirs is sufficient to permi
caution to be registered. In order to deprive a person o
right conferred on him by statute there must be expr
words. I find nothing in the statute depriving an adult
the right to register a caution because he occupies the posit
of administrator, and is the only adult interested, and
fact that he applies to register the caution is, in my opini
sufficient evidence of his consent.

When the administrator is the only adult interested in
estate and there are infant beneficiaries, the consent of
official guardian is required before a sale can be effect
and thus the estate is sufficiently protected.

CARTWRIGHT, MASTER. FEBRUARY 14TH, 19

CHAMBERS.

DOYLE v. WILLIAMS.

*Discovery—Affidavit on Production of Documents—Mot
for Better Affidavit—Contentious Affidavit — Exhibits
Practice.*

Motion by defendant for further affidavit on producti
by plaintiff.

R. C. H. Cassels, for defendant.

T. Hislop, for plaintiff.

THE MASTER:—The motion is supported by an affida
of defendant's solicitor making certain documents exhibi
which are said to be relevant. There has been no examin
tion of plaintiff, nor does anything appear in the pleadin
to allow an order to be made as asked.

The documents themselves cannot be looked at except
consent: Cutten v. Mitchell, 6 O. W. R. 497. In Standa
Trading Co. v. Seybold, 1 O. W. R. 651, it was said by Me
dith, C.J., delivering the judgment of the Divisional Cou
that "unless it was shewn either from documents produc
by the appellant (who had been ordered to file a further a
davit) which referred to other documents not produced,

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missions that he had other documents, a further ffidavit on production ought not according to the have been required to be made."

d a Rule similar to that under which White v. 901] 2 K. B. 241, was decided, the motion would successful. That Rule, it is said in the judg- amed to remove what was thought to be a defect xisting law as laid down in Jones v. Monte Video . B. D. 556. See too Morris v. Edwards, 23 Q. t p. 293.

ion must be dismissed with costs to plaintiff in

, MASTER. FEBRUARY 14TH, 1907.

CHAMBERS.

N v. TOWN OF COBALT AND VILLAGE OF HAILEYBURY.

Misjoinder of Defendants — Separate Causes of Action—Election.

ement of claim alleged that plaintiff contracted r from drinking the water at the town of Cobalt f Haileybury. He lived at Haileybury, and went alt every morning. He alleged that defendants y-laws to have a proper water supply, but had one.

ts the corporation of the town of Cobalt moved e action as against them, or to require plaintiff nst which of the defendants he would proceed.

emecar, for applicants.

erguson, for defendants the corporation of the aileybury.

in person, contra.

STER:—It is clear from Hinds v. Town of Barrie, 56, 2 O. W. R. 995, that even if a cause of ac- gainst either or both defendants they cannot be e action. Suppose a man had breakfast at one

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hotel and dinner at another, and was afterwards taken from having eaten something unwholesome, how could he the keepers of the two hotels in one action?

Plaintiff must elect within a week against which of defendants he will proceed. The action will be dismi with costs as against the other, and the costs of this mo will be to the remaining defendants in any event.

The statement of claim must be amended within weeks after plaintiff has made the election.

MACMAHON, J. FEBRUARY 14TH. 1

TRIAL.

RUSSELL v. CITY OF TORONTO.

Assessment and Taxes—Tax Sale—Assessment Rolls—De tive Description of Land—Validating Statute—Autho to Assessment Commissioner to Purchase for Municip —Waiver—Plaintiff as Alderman Voting for Resolu —Absence of Notice to Owner—Setting aside Sale.

Action to set aside a tax sale.

Plaintiff by his statement of claim alleged in par follows:—

1. That he was prior to 1899 the owner in fee of the la and premises situate on the east side of Carlaw avenu the city of Toronto, being part of lot 1 on the north sid Queen street east according to registered plan 96 descri etc. (by metes and bounds.)

2. That certain proceedings under the local improven clauses of the Municipal Act for the extension of Ca avenue and for the construction of a sewer thereon, estim to cost $15,000, although opposed by the plaintiff, were proved by the ratepayers affected, and these extensions improvements were carried out.

6. That the actual cost of the extension and sewer over $40,000, for which defendants assessed the lands plaintiff and other lands alleged to have been benefited th by.

7. That in or about April, 1901, defendants took proc ings for the sale of plaintiff's lands above described, for payment of the local improvement rates alleged to be du

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ereof as aforesaid, and assumed to offer such lands
y auction on 10th April, 1901.

at such lands were not sold, and defendants then
o adjourn the auction sale till 24th April, 1901, and
journed auction sale assumed to buy, in one block,
said lands and other lands not belonging to plain-
he amount of taxes alleged to be due in respect of
of said lands.

at by deed dated 1st October, 1902, and registered
October, 1902, the mayor and treasurer of the de-
ity corporation assumed to grant and convey plain-
s and the other lands aforesaid to the defendant
ration.

at defendants could not lawfully purchase in one
ntiff's lands and other lands not belonging to plain-

at the alleged purchase by defendants was invalid
ecause no notice in writing of the intention of de-
to purchase plaintiff's lands at the adjourned sale
by defendants to plaintiff.

at in any event plaintiff was entitled to redeem his
n payment of the amount, if any, due in respect
r taxes and expenses, but defendants refuse to con-
e redemption thereof and refuse to reconvey to

sels, K.C., and R. S. Cassels, for plaintiff.

Fullerton, K.C., and W. Johnston, for defendants.

AHON, J.:—The assessor's rolls for 1892, 1893,
5, 1896, 1897, and 1898, contain the following en-
he respective years:—

3990, Carlaw ave., vacant land, east side; owner,
ell; frontage, 1242; 8 57-100 acres.

3954, Carlaw ave., east side, south end; commencing
from Queen; vacant land; owner, John Russell;
1242; 8 57-100 acres.

154, Carlaw ave., east side, south end; vacant land;
ell; 1242; 8 57-100 acres.

817, Carlaw ave., east side, south end; commenc-
en street; vacant land; John Russell; 1242 x 300;
cres.

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1896: 3736, Carlaw ave., east side, south end; vacant land; John Russell; 1242 x 300; 8 57-100 acres.

1897: 3774, Carlaw ave., east side, south end; vacant land; John Russell, Wellesley crescent; 8 57-100 acres.

1898: 3842, Carlaw ave., east side, south end; vacant land; John Russell, Wellesley crescent; 1242 x 300; 8 59-100 acres.

In each of these assessment rolls the land is entered as being vacant. That is an error. Plaintiff has been during the past 10 years in possession through his tenants and collected from them the rents during that period.

Opposite each of the above entries is stated the value at which the property was assessed, the amount due for city and school taxes, the amount due for sewer rate and street extension—for the latter the taxes being each year $648.32.

Plaintiff paid the general taxes for 1892, 1893, and 1894, but no payments were made for or on account of the taxes for local improvements; and from 1895 to 1898 inclusive no taxes whatever were paid.

On 20th December, 1900, E. A. Macdonald, then mayor, issued his warrant to the treasurer to proceed and levy upon the lands described in the "ward lists hereto annexed" the arrears of taxes, and to proceed and sell said lands for such arrears as the law directs.

The list of lands in ward II. annexed to the mayor's warrant contained the following relating to plaintiff's land: 707 B.: Carlaw ave., east; John Russell; 1892-3-4-5; 3817; 1242 x 300, 8 59-100 acres; vacant land; 7385; John Russell; 8 59-100 acres, north of Queen street; not occupied; party notified May 26.

The city treasurer on 21st December gave notice of his intention to proceed to sell said lands at the city hall on Wednesday 10th April, 1901, and the following days until such sale should be completed, etc.

The description of the land in question attached to the notice is as follows:—

118: 8 57-100 acres, 1242 x 300 east side Carlaw ave., north of Queen street; John Russell; 1892 to 1896; amount of taxes in arrears, $8,640.62; charges for commission, $216.01; charges for advertising, 85 cents; total $8,857.48.

In the issues of the Ontario Gazette of 5th, 12th, 19th, and 26th January, 1901, was published a notice containing a

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f plaintiff's lands advertised for sale for taxes
l. . . .

and defendants made the following admissions
ers) in writing:—

ants offered the lands in question for sale for
held on 28th January and 19th April, 1898,
April, 1901, when a sale was not effected, and
them for sale again at an adjournment of the
ed sale held on 24th April, 1901, and at that
le assumed to buy in the lands themselves for
f taxes alleged to be due in respect thereof for
2 to 1898, both inclusive, and costs and charges.

ff knew before each of the said sales that the
be offered for sale for taxes, and before 10th
knew that the said lands had been offered for
at the previous sales, and that the said lands
be offered for sale, and also knew that no sale
n that day, and that the lands were to be offered
on 24th April, 1901, but made no inquiries as
happened at the sale held on 24th April, 1901,
made no offer to redeem the said lands within
r such sale.

ff for the purposes of this action admits the re-
e proceedings for the assessment and sale of the
nd including the giving of the mayor's warrant
ept in respect of the description of the lands,
intiff submits, insufficient.

t by the publication in the Toronto daily news-
the Ontario Gazette of the advertisements pro-
tice was given by defendants of their intention
id lands or to buy them in themselves.

ssment Act, R. S. O. 1897 ch. 224, sec. 13, re-
very assessor shall prepare an assessment roll,
er diligent inquiry, he shall set down, according
nformation to be had: (a) the names in full of
rsons resident in the municipality, etc.; (b) the
nd extent or amount of property assessable

north-west angle of plaintiff's lot . . . to
st corner of Queen street is 1,377 feet, and in
rolls is there given a point of commencement of
t frontage of plaintiff's lot on Carlaw avenue,
roll for 1893, where it is said to be 120 feet from

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Queen street, whereas the southern limit of plaintiff's l
135 feet north from Queen street; so that the descriptio
that roll would include 15 feet of the frontage of the adj
ing owner's land on Carlaw avenue. No depth is give
that roll. For 1897 the description is simply, Carlaw ave
east side, 8 57-100 acres. The descriptions for 1895, 1
and 1898, giving a frontage of 1242 feet on Carlaw ave
by 300 feet in depth, with an average of 8 57-100, shew
commencing point from which the frontage is to run, and
300 feet given as the depth would include 7 feet in width
1242 feet in length of the land of the adjoining owner to
east. In all the descriptions the land is entered on the
as vacant land.

The description of the lot in the roll annexed to
mayor's warrant, in the treasurer's notice, and in the ad
tisement in the Gazette, is the same—"1242 x 300, 8 57-
acres, east side Carlaw avenue." The words "north of Qu
street" are added after "Carlaw avenue" in the treasu
notice and in the advertisement in the Gazette.

That the mayor and treasurer considered the descrip
insufficient to convey any land is manifested in the convey
made by them to the city corporation, in which the desc
tion follows the conveyance of the lot to plaintiff as set ou
the statement of claim.

The lot I consider insufficiently described, and the
thereof invalid, unless validated by 3 Edw. VII. ch. 85,
8 (O.) . . .

[Reference to the provisions of secs. 183 and 184 of
Assessment Act, R. S. O. 1897 ch. 224, and to the amendm
of sec. 184 by 3 Edw. VII. ch. 21, sec. 11.]

There were 1,536 lots of land offered for sale on
April, for most of which there were no bids, as there
apparently about 1,200 lots withdrawn from sale. Wil
F. Fleming, the city tax clerk, who was appointed auction
clerk by Mr. Henderson, the auctioneer, said that where
had been made on any parcel, and it was withdrawn, no
cord was kept of such bids.

The sale was adjourned by the treasurer to 24th A
when all the remaining lots were put up and sold, the
becoming purchaser of about 1,000 of the lots, through
R. J. Fleming, the assessment commissioner, who wa
9th April, 1901, authorized to purchase on behalf of the

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ommendation contained in the following report of
of control, adopted by the city council:—

urned sale of lands for arrears of taxes.

oard have received a communication from the city
tating that the Assessment Act empowers munici-
purchase lands offered for arrears of taxes when
ffered at the adjourned sale is less than the amount
registered against such lands, provided the council
nicipality has signified its intention to do so at
lay before the sale, and, on the advice of the trea-
mmend that such notice be given before the date
ourned sale on the 24th instant, and that an officer
oration, viz., the assessment commissioner, be au-
nd instructed to purchase and acquire such lands
behalf of the corporation, as may be deemed ad-
the city's interest, the said lands so acquired to
ffered for sale within the time specified in the sta-
ely, seven years."

aintiff was an alderman of the city at the time the
opted that report, and voted for its adoption. He
that act waive his right to have the sale set aside
und of its being invalid: Blackwell on Tax Titles,
cs. 890 and 891.

ing to sub-sec. 3 of sec. 184, where there is a lot to
-sec. 2 refers (that is, which has been put up for
withdrawn because no offer of the full amount of
s of taxes had been made), it shall be lawful for the
ity to become the purchaser for the amount of
rs. It is, I consider, clear that the council must
lot or lots which the municipality desire to pur-
have given notice in writing of their intention so
d that they could not delegate that discretionary
the assessment commissioner; the authority to him
se and acquire such lands as he might deem advis-
e city's interest is void: Dillon on Municipal Cor-
4th ed., sec. 96.

ouncil, if it had selected and designated the lots of
esired to become the purchaser, could have appointed
to attend the sale, and purchase on its behalf.

assessment commissioner understood that it was
that at least one offer should be made on each par-
d put up for sale, which offer should be less than
nt of the arrears of taxes due thereon, before he

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(the commissioner) could offer the amount due for arrears; and in order that such prior bids should be mad brought with him to the sale two clerks from the assess department, who were instructed to bid and did bid on lot subsequently purchased for the city a sum less than amount due for the arrears of taxes, and the commissi then bid up to the amount of such arrears.

There was no fraud perpetrated by these prior bids b made. If no bid had been made, then the amount of t in arrear had not been offered, and the city could have off the sum due for the arrears and so become the purch The city could purchase when no offers were made, ju well as when offers had been made which fell short of amount of the arrears for taxes.

Mr. Fleming received no instructions as to what he to purchase or refrain from purchasing. He had not amined any of the properties and was not aware of value, and he purchased all the lots on which offers of amount of the taxes in arrear had not been made.

The corporation of the city of Toronto applied to legislature and obtained an Act validating the sales for t made in 1902; this is contained in sec. 8 of 3 Edw. VII 86, which (as afterwards amended by 6 Edw. VII. ch sec. 8) provides that "All sales of land within the said up to and including the one held in the year 1902, and porting to be made for arrears of taxes in respect of the l so sold, are hereby validated and confirmed, notwithstan any irregularity in the assessment or other proceedings imposition of any taxes so in arrear, or any failure to co with the requirements of the Consolidated Assessment 1892, or of the Assessment Act, in regard to the manne which any assessment roll or collector's roll of the said has been prepared, or in regard to the certifying or sig of the same, or the making of any affidavit or oath requ in connection therewith, or in regard to the time for th turn of any collector's roll of the said city, or in regard t furnishing, authenticating, or depositing of any list of in arrears for taxes within the said city, or in regard t mailing of notice to any person in respect to whose land taxes appeared at any time to be in arrear, or in rega any omission to levy the amount of any such taxes in a by distress and sale of goods, and notwithstanding any failure or omission by the said city or the council, or

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id city, to comply with any requirements of the nd notwithstanding anything to the contrary in e said Acts contained. Provided, however, that sold for taxes which is still held by the corpor- e redeemed by the owner thereof or any mort- on within three months from the passing of such owner or mortgagee paying to the cor- full amount which would have been necessary he same, within one year from the day of sale in the Assessment Act, including interest, the arges of the sale, and also all taxes which have sequent to the sale, and a sum for any year or ch the same may not have been rated for taxes t would have been the taxes thereon at the cur- r such year or years if the land had been as- private person, and also interest upon the sev- the time of such redemption; and provided nothing in this section contained shall affect which are the subject of litigation at the time ng of this Act."

in general terms validates and confirms all en sets forth and limits the extent to which on is to be applied, viz., to irregularities in nt, failure to comply in regard to the manner assessment roll or collector's roll has been pre- regard to certifying or signing the same, etc. generis doctrine applies, and the irregularities set out are all that the Act validates. Nothing onfirms or was intended to confirm a sale where not been duly assessed and in respect to which therefore be no taxes in arrear: Wildman v. R. 274, 2 O. L. R. 307; Carter v. Hunter, 9 O. decision of Mr. Justice Magee, arising out of e as that on which the action in hand is based; lgment of Mr. Justice Gwynne in O'Brien v. S. C. R. at pp. 454 and 461.

vital point is as to the want of notice. There ten notice served on plaintiff of the intention purchase his land at the adjourned sale. The r published an advertisement (exhibit 5) in two the daily papers in Toronto, giving notice of the the city to purchase such of the lands offered

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at the adjourned sale as may be deemed advisable in t interest of the city if the sums offered for the said lands a less than the arrears due. And an advertisement was a published (forming part of exhibit 5) in said city pape giving notice of the adjourned sale of lands for taxes to held on Wednesday 24th April, 1901, for taxes, and that list of the lands to be offered for sale could be seen at t office of the city treasurer.

This was not a compliance with the Act, which quires that a "written notice" should be given to the owr of the land of the intention of the municipality to pu chase. This is a pre-requisite to the municipality becomi a purchaser. One object of the notice is "to bring home the owner for the last time the knowledge that his estate in jeopardy. . . . It is held in all the States, believe, that the giving of the notice in the form and ma ner prescribed by the statute is such an essentially jurisd tional fact that no circumstance will obviate the necess of it. Where the law requires 'printed' notice of a tax sa a sale made under written notice is void:" Black on T Titles, 2nd ed., sec. 205; Regina v. Meath, [1897] 2 Ir. 221. And Sir William Meredith in the case of Brooke City of Toronto, tried before him on the 23rd April, 19 (not reported), held that notice in writing of the intent of the city to purchase not having been given to the pla tiff (the owner), the city could not become a purchaser.

For the reasons stated, the sale cannot stand, and plaintiff is entitled to have the sale thereof to defenda and the deed from the mayor and treasurer to defenda declared invalid. Plaintiff is entitled to redeem on pay to the city all the taxes, including all the taxes which h accrued thereon since the sale, together with the inter thereon.

Had plaintiff tendered the amount of the taxes and terest, together with a deed for execution by the corp ation, I would have allowed him the costs of the act Each party to pay their own costs.

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THE

RIO WEEKLY REPORTER

(To and Including February 23rd, 1907).

TORONTO, FEBRUARY 28, 1907. No. 7

. MASTER. FEBRUARY 18TH, 1907.

CHAMBERS.

ROWLIN v. ROWLIN.

Lien—Action to Enforce—Statement of Claim—ars—Unnecessary Motion—Practice—Costs.

y defendant for particulars of the statement of

rsons (O'Brian & Henderson), for defendant.

d (Bicknell & Co.), for plaintiff.

TER:—This is a proceeding under the Mechanics' ought by a father for work and labour done on perty. The statement of claim alleges that be- tober, 1905, and 3rd November, 1906, "plaintiff amount of work and labour on the lands of de- he value of $200, of which he has been paid on

livery of defence the defendant asked for full n writing with dates and items of work done and rmed, as set forth in the statement of claim. . .

such as Trussed Concrete Steel Co. v. Wilson, would be reasonable to take the proceedings usual involving such a large amount. This action, ne by a wage-earner for only $170. Under secs. f the Mechanics' Lien Act the utmost costs that ed will be $42.50, and sec. 43 was intended to interest of both parties to proceed as inexpen-

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sively as possible. These limitations seem to shew th terlocutory motions were not contemplated, as the co one, if taken to a Divisional Court, would far exce many cases 25 per cent. of the claim.

I have never had any such application made to me in view of the facts of the case, it seems that no good pu would be served by making the order asked for.

Here the defendant denies liability, and it is left plaintiff to make out his claim to the satisfaction o referee. All matters and questions were evidently int to be left with the referee, and the present applicati necessary, should be made to him.

It would seem, however, that in most cases such an would not be necessary. If the plaintiff's evidence took the defendant by surprise, the trial would, no dou adjourned to allow defendant to make out his defence.

I think the motion should be dismissed, and the co it be reserved until the case has been tried, unless the p will agree to their being disposed of by the referee, wh be in the best position to judge if the motion was pr made or not.

ANGLIN, J. FEBRUARY 18TH,

CHAMBERS.

REX v. HODGINS.

Justice of the Peace—Jurisdiction—Delay in Issue of mons—Liquor License Act — Criminal Code — Pr tion.

Motion by defendant for prohibition to justices o peace, on the ground of undue delay in issue of sum for breach of Liquor License Act.

W. E. Middleton, for defendant.

J. R. Cartwright, K.C., for the Crown.

ANGLIN, J.:—The Liquor License Act requires th information for an offence against its provisions shall b within 30 days of the commission of the offence. Th

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ged offence having been committed on 21st
and the information laid on 24th October.
hat the summons to defendant, though bearing
ber, was not in fact issued till 14th January,
r. Middleton argues, was contrary to the pro-
559 of the Criminal Code, which directs that,
g any complaint or information, the justice
consider the allegations of the complainant,
ion that a case for so doing is made out, he
ummons." Counsel also calls attention to the
ons, form E., which reads, "Whereas you have
charged," etc., and cites Regina v. Lennox, 34
Regina v. Humphrey, 10 A. & E. 335; Regina
12 Q.B. 960; and Scott v. Palmer, 1. Q.B. 813.
the Criminal Code requires that a magistrate
summons forthwith upon taking an informa-
any undue delay in the issue of the summons
he purpose of the requirement of the Ontario
e information should be laid within 30 days
ission of the offence.

o doubt that the Ontario statute contemplates
f offences against its provisions. But sec. 559
l Code applies to offences of all kinds. More-
ms requires the magistrate to "consider the
the complainant," and it is only if he is "of
case for so doing is made out" that he is di-
a summons. That consideration may require
cases the course of duty is plain, and no pro-
ration is needed. It is therefore to be ex-
form of the summons should read as it does
dinary case. But the presence of the words
form E., having regard to the language of
means warrants a construction of that section
ompel the magistrate in every case in which
formation to issue a summons forthwith or not

gether from the fact that defendant has been
ted, I think the motion entirely fails, because
een shewn which would enable me to say that
mmons on 14th January, 1907, for an offence
21st October, 1906, and in respect of which in-
laid within 3 days thereafter, the justice ex-
isdiction.

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FEBRUARY 18TH,

DIVISIONAL COURT.

McCORMACK v. TORONTO R. W. CO.

Damages—Assignment of Claim for Damages ex Deli Action by Assignee—Cause of Action—Chose in Acti Invalidity of Assignment.

Appeal by plaintiff from judgment of ANGLIN, J., W. R. 467.

J. M. Godfrey and T. N. Phelan, for plaintiff.

H. S. Osler, K.C., for defendants.

THE COURT (FALCONBRIDGE, C.J., CLUTE, J., RIDI J.), dismissed the appeal with costs.

CARTWRIGHT, MASTER. FEBRUARY 19TH,
TEETZEL, J. FEBRUARY 22ND,

CHAMBERS.

NORMAN v. HAMILTON BRIDGE WORKS CO.

Particulars—Statement of Claim—Joint Negligence of fendants—Joinder of Defendants.

Motion by the added defendants, Hedden & Sons particulars of the statement of claim.

T. N. Phelan, for applicants.

J. E. Jones, for defendants the Hamilton Bridge W Co.

J. H. Spence, for plaintiff.

THE MASTER:—The plaintiff began this action alm year ago against the bridge company, for whom he was ing, on the eighth storey of the Traders Bank building, i city of Toronto, when he was severely injured and nar escaped death on 1st December, 1905.

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erwards amended by making Hedden & Sons, the ntractors, parties defendants. The amended state- aim, in paragraph 6 (b) says: "The accident was by the joint negligence of both the defendants as set forth." It then gives as particulars of such (1) that there was no flooring on which plaintiff stood, and so have avoided the accident; (2) that which he was hauling up lumber fouled on a wire left unprotected in the unfinished concrete floor lower storey; and (3) that the rope was too short rpose of raising the lumber.

ded defendants on 7th January demanded particu- alleged joint negligence. To this plaintiff replied tating that the particulars were fully set out in ent of claim as above.

ants are not satisfied, and now move for an order articulars, supporting the motion by the usual affi- the necessity of particulars before pleading. . .

the motion cannot succeed. It was admitted on nt that the main object was to get particulars and quire plaintiff to elect as in Hinds v. Town of . L. R. 656, 2 O. W. R. 995, and subsequent cases.

ent there seems a sufficient allegation of a joint ction, as there was in Symon v. Guelph and . W. Co., 8 O. W. R. 320, and sufficient particulars f the three grounds on which the action is based. be no difficulty in pleading, as the Heddens can loubt as to what it is they are charged with, and decide what attitude they will take. Possibly one the defendants as against the other may invoke

y recent case of Bullock v. London General Omni- 907] 1 K. B. 264, seems to indicate a new inter- f Rule 186. But what was said on this point was ry to the decision, and, as was pointed out, it e after trial to object to a misjoinder. But the th noting, and seems to be in the line of the ob- of Osler, J.A., in Hinds v. Town of Barrie, 6 O. 661. The motion is dismissed, but the costs will ause. The other defendants having supported the y should both take short notice of trial, so that

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the case can be taken at the coming jury sittings, if de
by plaintiff.

(Affirmed by TEETZEL, J., on appeal.)

CARTWRIGHT, MASTER. FEBRUARY 20TH, 1

CHAMBERS.

MORENCY v. WILGRESS.

Pleading—Amendment—Statement of Defence—Libel Slander Act, secs. 13, 16.

Motion by defendant for order requiring plaintiff to tend for re-examination for discovery, and for leave to am the statement of defence.

J. E. Jones, for defendant.

T. J. W. O'Connor, for plaintiff.

THE MASTER:—This is an action brought against publisher and proprietor of a newspaper for an alleged l By the statement of defence the defendant admits pub tion, but brings $25 into Court as sufficient to satisfy pl tiff's claim, and pleads in mitigation of damages pursuan sec. 6 of the Libel and Slander Act, R. S. O. 1897 ch. 6

The plaintiff, on being examined for discovery, ref to answer certain questions on the advice of his solicitor.

The defendant now moves (1) for an order for plain re-examination, and (2) to be allowed to amend by set up defences under secs. 13 and 16 of the Libel and Sla Act, and otherwise as advised. . . .

In my view of Williams v. Leonard, 16 P. R. 544, specific amendments asked for should be allowed.

If sec. 13 is found to apply, the action would seem t at an end. And I have in consequence found some diffi in arriving at what is the proper order to make. On one hand, it would seem that if defendant had known of defence earlier he would have relied on it and not have any money into Court. He could safely have pleaded statutory bar. If it exists and can be proved, then u

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Central Canada Savings Co., 17 P. R. 470, it owed to be pleaded, "being a defence permitted the real question between the parties being as to the plaintiff to recover by action the damages that "the very right and justice of the case de- ne plaintiffs should not recover in this action if ffords a bar to their right to do so:" per Mere- 472. The same principle would also apply to a g sec. 16.

her hand, the plaintiff should be allowed to con- ourse he will take when the statement of defence s amended. And he is entitled to be in as good if the amended statement of defence had been first. It therefore seems enough at present to fendant to amend as asked within 4 days, and question of costs and of the other motion until has decided what he will do. The matter can ght up again by either party on the usual no-

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FEBRUARY 20TH, 1907.

DIVISIONAL COURT.

McINTYRE v. NEWTON.

terest in Syndicate for Sale of Patent—Royalty -Share of Profits—Evidence—Agent.

v defendant from judgment of TEETZEL, J., in aintiffs in an action to recover $3,000 as plain- f a royalty on the sale of a secret process or the manufacture of paint.

y, for defendant.

-Staunton, K.C., for plaintiffs.

ment of the Court (FALCONBRIDGE, C.J., CLUTE, J.), was delivered by

J.:—Defendant, having discovered a process for tain waste products, entered into negotiations re, one of the plaintiffs, which resulted in an

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option being given by defendant to McIntyre for a sale of
patent for $6,000 and a royalty of 5 cents per gallon. At
same time another agreement was entered into whereby
fendant agreed that this royalty should upon sale of
patent be divided among McIntyre, his wife (co-plainti
and the wife of defendant, one-third to each. McIntyre
ing unable to carry out the option within the time limited
was extended. Thereupon McIntyre succeeded in gett
certain capitalists interested. An objection was taken
these, or some of them, to the royalty; and finally it
agreed that this should be sold for or commuted at $6,0
This made a purchase price of $12,000. McIntyre was
lotted $2,000 interest in the syndicate "for throwing a g
thing in their way." He also, before the deal was carr
out, agreed to pay $1,000 of the $12,000, and he did this
an arrangement with defendant, so that the amount paid
cash to defendant was $11,000. The syndicate then arran
amongst themselves that the price to be put upon "the h
ings" should be $15,000, of which $3,000 should belong
McIntyre, and the remainder be divided amongst the ot
members. . . .

As to the $1,000 arranged between McIntyre and de
dant, McIntyre . . . says that he agreed with defend
that he might turn over the royalty to the syndicate at $6,0
and that then he arranged with defendant that defend
should allow him $1,000 by reducing the amount to be
ceived from $12,000 to $11,000. Defendant denies this,
says that McIntyre was to give him a note for the $1,
The trial Judge has believed McIntyre's story, and I see
reason for disturbing the finding. The result is that pl
tiffs McIntyre and wife would be entitled to two-thirds
$6,000, that is, $4,000, less $1,000, equalling $3,000.

But it is contended before us that McIntyre was a n
agent for sale of the defendant. Upon the facts as found
the trial Judge, I do not think this contention can prev
No one will dispute the authority of the cases relied upon
defendant: Pardee v. Ferguson, 5 O. W. R. 698, 6 O. W
810; Mayor, etc., of Salford v. Lever, 25 Q. B. D. 3
[1891] 1 Q. B. 168; Anderson v. Ramsay, [1902] 2 K
635; Nitedals v. Bruster, [1906] 2 Ch. 671; Calloway
Stobart, 35 S. C. R. 301; but these cases are not in point
the facts of this case.

Appeal dismissed with costs.

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AL MASTER AT OTTAWA. FEBRUARY 18TH, 1907.

MASTER'S OFFICE.

E OTTAWA CEMENT BLOCK CO.

MACOUN'S CASE.

Winding-up — Secretary-Treasurer — Claim for and Expenses—Contributory—Shares—Payment—Authority—Preference.

reference for the winding-up of the company one d a claim against the company, which was dis- the liquidator sought to have Macoun placed on ontributories.

uthrie, Ottawa, for Macoun.

Fisher, Ottawa, for the liquidator.

CAL MASTER:—Leslie S. Macoun has filed with or a claim for "services rendered," amounting to is disputed. The liquidator, on the other hand, e the claimant placed on the list of contributories eged to be due for unpaid calls on stock. Both e tried together, and on the hearing I allowed the mend his claim by setting up a claim for $409.75 f clerk, rent of office, share of office expenses, bursed in other ways on behalf of the company. t alleges that the amount said to be due on his id by set-off prior to the winding-up order, or, claims to be entitled now to set off a proportion- his claim against the amount so due. The com- corporated in June, 1905, and commenced oper- e following month. The claimant, who was one ors, was appointed secretary-treasurer. It is al- e was to be paid a salary therefor, but no by-law to that effect was ever adopted, and I dismiss so far as it relates to salary. I find, however, n of $318.24 is due him for salary of clerks, ce expenses, and other disbursements made on e company. His private office was used as the company, one clerk attended exclusively to the

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company's business, and a considerable portion of the
of other employees was also occupied with it.

Mr. Macoun was the holder of 11 shares of the ca
stock of the company of the par value of $50 a shar
which the first call of 50 per cent. was paid. No further
ment was made, unless the transaction presently to be ref
to constituted a payment. The second call on the stock
made on 6th October, 1905. On 31st December, 1905,
Macoun himself entered on certain loose sheets which
serving the purpose of the company's cash book, on the
side, "L. S. Macoun part payment on account servic
date $275," and on the credit side "L. S. Macoun 50
cent., last call of 11 shares $275." These loose sheets
after the date of the winding-up order, transferred to a
(produced on the hearing), and the originals were afterw
lost or destroyed. I however find on the evidence tha
sheets in question constituted the company's cash book,
that the entries were made therein as stated. The en
were made without the knowledge or consent of any
officer or director. The proportion of the $316.24 then
was $271.06 or $3.94 less than the $275 purported to b
off. It will also be observed that the $275 is described a
for "services" and not for "disbursements." Habersh
Case, L. R. 5 Eq. 286, and Spargo's Case, L. R. 8 Ch.
are of course clear authority that a set-off properly mad
fore winding-up commenced should not be disturbed. I
however, unable to come to the conclusion that there wa
valid set-off even pro tanto, and that for two reasons.

In the first place, the secretary-treasurer does not ap
to have had any authority to make such a set-off. The
nothing in the by-law defining his duties as secretary-trea
giving him general authority even to pay accounts, and
invariable practice was for the president to examine
vouchers before signing a cheque. A great many, per
most, of the amounts disbursed were, it is true, paid in
first instance by the private cheque of the secretary-t
urer, but it is clear that in making these payments he
the risk of being able to satisfy the company as to their
priety: for in every instance a cheque to reimburse him
signed by the president after examining the voucher.

In the second place, the transaction, assuming it to
stitute a valid set-off, was an undue preference and ca
stand. The company were at the time hopelessly insol

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e winding-up order was not made until 31st March. I refer to Kent's Case, 29 Ch. D. 259, and In re n Diamond Mining Co., [1893] 3 Ch. 95.

nally contended that the claimant is entitled even t off the company's indebtedness to him against it due on his shares. The contrary is so well set- he position is not arguable. Re Wiarton Beet Sugar L. R. 219, 5 O. W. R. 637, was attempted to be dis- on the ground that it was a decision under the ct; but the English cases there relied on are of gen- ation. To go no further, the two cases just cited ty for setting aside the transaction as an undue , a fortiori shew that there can be no set-off after -up order. They rest on that, and in the latter han Williams, J., says specifically (p. 104): "The winding-up would be that the claim for calls on ld become a claim by the liquidator, against which der could not set off any claims which he might st the company."

aimant will therefore be scheduled as a creditor 4, and will be placed on the list of contributors for e costs of the former issue will be added to the those of the latter must be paid by the claimant idator.

HT, MASTER. FEBRUARY 21ST, 1907.

CHAMBERS.

MILLS v. SMALL.

— Foreign Commission — Examination abroad of laintiffs — Action by Nominal Plaintiff—Terms— y for Costs of Commission.

by plaintiff for a commission to take evidence of sses in the United States. This was supported avit of plaintiff's solicitor and by that of one of sed witnesses.

Bicknell, Hamilton, for plaintiff.

Counsell, Hamilton, for defendant.

ASTER:—From the pleadings it appears that the o recover a sum of $2,847.02 for services ren-

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dered by three of the proposed witnesses (who are all dent in the United States), with the exception of trifling sum of $28.52 earned by plaintiff himself. Plai was examined in May last. He states that he has no kn ledge of the matter outside of the $28.52. He had communication with his assignors, and never saw any the three. It was all done through his present solic He has paid nothing for these assignments, and if he covers anything over the costs it will be paid to them their claims. They are indemnifying him against the c though he does not know whether he has a writing to effect or not. He never asked for these assignments, his solicitor asked him to so take them.

It is rather surprising after this to find the one of proposed witnesses who has a claim for $2,000 in his davit in support of the motion stating that this claim " by the said company absolutely transferred, assigned, set over to the plaintiff herein for valuable considera on the 3rd day of April, 1906."

The action was commenced just a week later. For s unexplained reason it has not been prosecuted with diligence, as three sittings have gone by without either making any move to bring it to trial.

The defendant's affidavit states that, in his opin these witnesses, as the real parties to the action, sh appear at the trial. It goes into other matters not ne sary to notice. While it might appear reasonable for t persons who did the work to attend and give evidence voce, yet under Robins v. Empire Printing Co., 14 P. R. (spoken of by Osler, J.A., in Ferguson v. Millican, 11 O R. at p. 41, as "a well considered judgment"), even if are to be considered as the real plaintiffs, and assuming they could unite in one action, they cannot be deba from giving their evidence on commission. As it is a jury action, they must know that they may be putting th selves at a disadvantage in not giving their evidence be the trial Judge.

I think, however, that, under the special facts, de dant is entitled to security for costs of the commiss See Watt v. McKay, 5 O. W. R. 93, 170, and cases cite

If the parties cannot agree on the proper amount, I fix it on the issue of the order.

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T, MASTER. FEBRUARY 21ST, 1907.

CHAMBERS.

JAMES v. JAMES.

ion to Change — Action for Alimony — Interim Disbursements—Terms—Costs.

by defendant to change the venue from Brant-
ruga in an action for alimony, begun on 15th
1906. The statement of claim was delivered
uary, 1907, and statement of defence on 16th.
for interim alimony and disbursements had been

adford, for defendant.

leyd, for plaintiff.

STER:—The statement of claim alleges that the
ok place on 7th June, 1905, and that the parties
he township of Canboro, on defendant's farm,
6 months, when plaintiff was obliged in self-
eave defendant.

nt's affidavit states that he and his 6 witnesses
e township of Canboro, which is 15 miles from
45 from Brantford, and that the cause of action
e township of Canboro; which agrees with the
f claim.

intiff now swears to acts of cruelty at Paris,
residing with her mother. But no mention of
rs in the statement of claim. In any case, as
t Paris is only 7 miles nearer to Brantford than
the 7 Paris witnesses (including the plaintiff
ther) can safely be disregarded, even supposing
necessary and material, which may be doubtful.

these, plaintiff swears to 7 more witnesses, who
Brantford.

of the undoubted facts and of the allegations in
nt of claim, it is hard to believe that plaintiff
ngle witness at or near the place where she lived
usband, and where the statement of claim al-
he acts of cruelty and brutality, on which she

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relies, were all committed. The caustic remarks of Juc on this head are at once recalled to mind. Of these the c ment of Britton, J., in Sturgeon v. Port Burwell Fish Co., 7 O. W. R. 360, is the latest instance and is very p tinent: "It will be a matter of surprise if either party c half the number named." There the defendant had sw to 19 witnesses and the plaintiff had named 19 or 20.

However that may be, I think that what was decided Ferguson, J., in a similar action of Fogg v. Fogg, 12 P. 249, may properly be applied here, if the plaintiff ma the usual application for interim alimony and disburseme (which may as well be embodied in this order). If for reason no such order is to be asked for, the motion will refused. In either case the costs will be in the cause.

MABEE, J. FEBRUARY 22ND, 19

TRIAL.

GALLAGHER v. CITY OF TORONTO.

Municipal Corporations — Sewer — Insufficiency—Injury Property—Liability—Costs.

Action for damages for injury to plaintiff's property flooding from sewers.

H. T. Beek, for plaintiff.

H. L. Drayton, for defendants.

MABEE, J.:—It was left to the jury to assess plain damages; they found $300 as a proper sum for him to ceive. I reserved judgment upon defendants' motion nonsuit.

Euclid place, upon which the drain or sewer was loc which caused the trouble, was block-paved some years ap the city, I presume under the local assessment clauses o statute. No sewer was constructed by the city, or at the evidence does not shew whether the sewer compla of was originally put down by the city or by some of the property owners on Euclid place, but I think the fair i

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it was put down by the property owners, and
ity authorities, and, in view of the evidence of
s to what took place between plaintiff's grantor
officials, I find the fact to be that the sewer in
a private one, and that it had not been con-
the city authorities, nor was it ever assumed by
the block-paving of this lane by defendants
liable for any defect in original construction of
such defect be established?

ontended for plaintiff that the soil was vested
icipality; that the property owners could not
roadway to enlarge the sewer; and that defen-
iable for, in effect, maintaining a nuisance.

ipality laying out a street is not bound to build
y then is it liable to enlarge an existing sewer
o its becoming more than a mere private lane?
nk, under the facts disclosed at the trial, that
on was cast upon defendants to either enlarge,
epair, the sewer existing in this lane at the time
ving was done.

think the mere fact that the sewer became
rags and dead rats was conclusive evidence of
acity of the sewer pipe; it has served the pur-
d for many years; and the only evidence of its
all was the statement of a sewer inspector that
laws required a larger-sized pipe where more
uses drained to the same sewer pipe. The by-
put in evidence, nor was there anything to shew
of houses was referred to by the witness, the
nmates, nor the amount of sewage that the by-
ling with, and I am unable to say if more sew-
rom the houses on this lane than would come
uses of the kind that the witness spoke of as
n the by-law. I cannot say the sewer is not of
ufficient size to carry the sewage it is intended
he fact of its being stopped up by rags thrown
wrong-doer does not make the defendants liable.
herefore that no defect in construction has been

reserved the motion for nonsuit at the close of
se, it must not be understood that anything but
of damages was to be disposed of by the jury,
sly refrained from permitting them to deal with

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any of the questions of fact that might be involved; oth wise I should have tried the case without a jury—so in missing the action I deal with such facts as seem to necessary for me to find upon.

Plaintiff's loss to him was heavy, and I think, in reli ing defendants from liability, I do not offend against rule by withholding costs. If an appellate court is of opinion that I am wrong in the conclusions at which I h arrived, plaintiff will, of course, be entitled to judgment the $300 damages found by the jury.

TEETZEL, J. FEBRUARY 22ND, 19

CHAMBERS.

CREIGHTON v. TOWN OF COBALT AND VILLAGE HAILEYBURY.

Parties — Misjoinder of Defendants — Separate Causes Action—Election—Amendment.

Appeal by plaintiff from order of Master in Chamb ante 287.

Plaintiff appeared in person.

W. J. Tremeear, for defendants the corporation of town of Cobalt.

J. M. Ferguson, for defendants the corporation of village of Haileybury.

TEETZEL, J., amended the order by making the dismi of the action as against the defendant not to be procee against without prejudice to another action against defendant in the event of plaintiff's failure against defendant whom he elects to retain in this action. Cost defendants in any event.

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J. FEBRUARY 22ND, 1907.

TRIAL.

ONAL CASKET CO. v. ECKHARDT.

— Infringement—Similarity—Distinction—Id-
s—Absence of Fraud or Deception—Passing off

restrain defendant from using the name
sket Company" to the prejudice of plaintiffs.
ohnston, K.C., and R. McKay, for plaintiffs.
son, K.C., for defendant.

N, J.:—The plaintiff company was formed in
malgamation of 3 firms carrying on the busi-
acturers and wholesale dealers in burial goods
of New York, being incorporated under the
e National Casket Company of the United
an Act of the State of New York passed in
ctory and head office of the company are at
A few years after the company was formed,
were amalgamated with it, and it now has
nches throughout the United States, doing
over $2,000,000 a year.
commenced selling goods in Canada in 1890,
some sales were made from the Oneida ware-
pments as a rule were either from the Roches-
branch. . . . Plaintiffs advertised their
certain extent in Canada. . . .
had carried on a similar business for a great
Toronto under the name of "The Eckhardt
ntil burned out by the great fire of April,
h time his business had reached a yearly out-
$250,000. . . . He was out of business
906, when he resumed, advertising the business
ional Casket Company and National Silver
ny, A. J. H. Eckhardt, proprietor." In the
d to the trade, the name of the company on
n appears very prominently, but Eckhardt's
instance appears as the proprietor; and it is

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stated that "the company is the successor of the Ec
Casket Company and the Eckhardt Silver Plating Com
. . .

The business defendant was doing at the beginni
the year 1907 was about equal in volume to what h
doing at the time of the fire in 1904, namely, $250,000

The caskets manufactured by plaintiffs and shipp
Canada were much finer and far more expensive tha
goods manufactured by defendant or any other dea
(at least) Ontario. . . . Plaintiffs never had any
house or agency in Canada, so that undertakers req
their caskets must order from travellers or write or
graph to Buffalo or Rochester to get their orders fill

Defendant did not copy any of plaintiffs' desig
caskets. . . .

Plaintiffs allege that since the resumption by defe
of his business in April, 1906, and the use of the liter
with plaintiffs' trade name of "The National Casket
pany," it has been the means of very greatly reducin
volume of their business in Canada. . . .

The claim made is that the alleged use by defe
of the trade name under which plaintiffs have carri
their business is likely to deceive those in the trade
undertakers—into purchasing defendant's caskets inst
plaintiffs'. No question as to a trade mark is involved

[Reference to National Folding Box and Paper
National Folding Box Co., Limited, 43 W. R. 156.]

There is no right to the exclusive use by plaintiffs
word "National" as forming part of the trade name
have adopted. So that, if defendant had preferred the
"Canadian" or "Eckhardt's" to "National," and so
his trade name either "The Canadian National Casket
pany," or "Eckhardt's National Casket Company,"
would have been no infringement of plaintiffs' rights.
Colonial Life Assce. Co. v. Home and Colonial Assce
33 Beav. 548. That being so, a suffix by defendant
name, making the name of the company "The Na
Casket Company—Eckhardt's," would be equally effect
preventing an infringement of plaintiffs' rights, and
what has been done by defendant. . . .

[Reference to Merchants Banking Co. of Lond
Merchants Joint Stock Bank, 9 Ch. D. at p. 563; L

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l Law Assce. Society v. London and Provin-
ek Life Assce Co., 17 L. J. Ch. 37.]

be said that defendant, who carries on his
r the trade name of "The National Casket
J. H. Eckhardt, proprietor, Toronto," is re-
h business as the business of plaintiffs, who
ir business as late as December, 1904, in the
and Upholstery Journal," published in To-
e National Casket Company, U.S.A.," and as
on in several cities in the United States, and
made of any Canadian connection.

no fraud intended, nor was any perpetrated,
ding to the evidence, there was no possibility
efendant's caskets for those of plaintiffs, and
e could be no deceit where an inspection of
f the two factories was had. And no trader
ld be misled by any circular or advertisement
ndant which states that his "National Casket
Eckhardt's business carried on in Toronto,
laintiffs is carried on in the United States.

name of defendant himself and not any ad-
supposed by plaintiffs to have been derived
f the name "National Casket Company" (for
er was obtained when an amalgamation of
es was contemplated), that caused the decrease
he sales of plaintiffs since the resumption by
usiness in 1906. . . .

nissed with costs.

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e. C.J. FEBRUARY 15TH, 1907.

CHAMBERS.

DUNN v. McCALLUM.

ns — Lis Pendens — Lien of Material Man —
laim against Lands of three Owners.

plaintiff in a mechanic's lien action from
r in Chambers, ante 33, vacating the registry

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of a certificate of lis pendens against the lands of th separate owners.

J. Bicknell, K.C., for plaintiff.

W. E. Middleton and E. A. Forster, for defendants t owners.

FALCONBRIDGE, C.J.:—. . . Section 18 of . . R. S. O. 1897 ch. 153, was first enacted totidem verbis 59 Vict. ch. 35, sec. 17, after the decisions in Currier Friedrich, 22 Gr. 243, and Oldfield v. Barber, 12 P. R. 5 Now, I do not see what right I have to read into sec. after the word "properties," the words "of the sa owner;" and I do not think that . . . Booth v. Boo 3 O. L. R. 294, 1 O. W. R. 49, is opposed to this view, though that was an a fortiori case, because it appeared th a separate account had been kept in respect of each p perty.

I think that here there has been a substantial comp ance with the Act, and I fail to see how any of the def dants are really prejudiced. Plaintiff would be seriou prejudiced if he could not maintain his lien merely becau he is unable at this stage of the proceedings to assign t exact amount of lumber furnished to each particular lot. .

Appeal allowed. Costs in the cause.

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THE

RIO WEEKLY REPORTER

(To and Including March 2nd, 1907).

TORONTO, MARCH 7, 1907. No. 8

FEBRUARY 11TH, 1907.

DIVISIONAL COURT.

NSON AND VILLAGE OF BEAMSVILLE.

orporations — Local Option By-law — Motion to irregularities in Submission to Electors—Adver- osting—Time of Passing by Council—Substan- pliance with Statute — By-law Good on Face — Moving—Discretion—Refusal to Quash—Costs.

y Robinson from order of MULOCK, C.J., 8 O. refusing to quash a local option by-law which t applied to quash upon several grounds, and ne motion of the appellant with costs.

son, K.C., and C. H. Pettit, Grimsby, for ap-

ney, for the village corporation.

gment of the Court (MEREDITH, C.J., MAC- TEETZEL, J.), was delivered by

H, C.J.:—Upon the appeal 3 grounds only are by counsel for the appellant:—

the by-law was not properly advertised.

notice of the by-law was not posted up in 4 s, as required by the statute.

the by-law was passed within one month after plication in the newspaper.

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The first of these objections depends upon sub 2 of sec. 338 of the Municipal Act, which provides as lows: "The council shall, before the final passing of proposed by-law, publish a copy thereof in some public n paper published either within the municipality or in county town, or in a public newspaper published in an joining or neighbouring local municipality, as the co may designate by resolution; and the publication shall the purpose aforesaid, be continued in at least one nu of such paper each week for 3 successive weeks—" then t follows the provision which relates to the second objec "and the council shall put up a copy of the by-law at more of the most public places in the municipality."

It is argued that the true construction of the first of the sub-section is that there shall be 3 insertions a apart after the first publication. I think to give that struction to the section would require us to read it a the word "thereafter" were inserted after the words " cessive weeks," so that it would read, "and the publica shall, for the purpose aforesaid, be continued in at least number of such paper each week for 3 successive w thereafter." Perhaps the word "continued" is not chosen, but I think the evident meaning of it is that it be for 3 successive weeks; not that the publication shal inserted once and then continued for 3 successive week think, therefore, that the first objection fails.

There are two grounds relied upon in support of second objection: first, that there was substantially no pliance with that direction of the statute, because the n was of such a size and form as practically to be no no second, that it was not shewn, but the contrary proved, it was posted in 4 places, the evidence being, as it was tended, that the posting was in 3 places only; and the o tion is taken by Mr. Pettit that there was no resolutio the council authorizing the posting.

With regard to the first, there is no direction in statute as to the form or manner in which the notice be prepared. It may be, and I think often is, in som the smaller municipalities, a written notice; and it seem me impossible to say, where there was a printed notice legible, and a copy exactly the same as that which appe in the newspaper—it appears to have been taken from same type—that that was not a compliance with the sta

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d in the course of the argument, the council
ne notice to be put at the top of a telegraph
ne other place where it would be impossible
had reduced it to such a size that practically
notice at all, the Court might say that was
ce with the statute; but this is not a case of

is evidence which satisfied the Chief Justice
ponderance of testimony—that 4 notices were
evidence of the clerk is that his invariable
put up 4 notices; he has no distinct recol-
t he did in this particular case, but believed
one notice upon a cupboard in his shop in the
nsville, and 3 other notices were undoubtedly
man to whom they were given for that pur-

idence that the notice was seen posted up in
ce, and, although there is evidence upon the
the notice was not seen, I think the affirma-
ought to prevail, and, speaking for myself, if
ining the case in the first instance I should
the same conclusion as the Chief Justice
impossible, however that may be, to say that
in coming to that conclusion.

the place where the fourth copy was posted
ost public places," within the meaning of the
ight be, if the shop in which it was posted was
n ordinary ratepayer having no connection
ipality, that there would be some difficulty in
t was one of the "most public places." I do
en there I should come to the conclusion that
night not come within the description con-
statute; but here, it was in the store of the
he place to which the public would resort for
doing municipal business; and I think it is
stion to say that that may not be treated as
ost public places" within the municipality.

has referred to In re Salter and Township of
. L. R. 51, 1 O. W. R. 266, in support of the
on which the second objection is based.

ther Britton came to the conclusion that it
that there should be a resolution or by-law

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of the council directing the putting up of the copies requ
by this section, or by a similar section with which he
dealing, then I must respectfully say that I am unab
agree with his conclusion. These notices were put up by
clerk. The putting up of them was a mere ministerial
and the notices put up by the clerk, or by his direction in
course of his duty, were, I think, clearly notices put u
compliance with the statute.

The third objection is that the by-law was passed on
22nd February, and, therefore, within a month after
first publication of the notice.

Upon its face, the by-law purports to have been pa
upon that day. If passed upon that day, it was undo
edly an invalid by-law. However, the evidence satisfied
Chief Justice that the by-law was not passed on 22nd
ruary, but on 27th February. The circumstances that
clerk forgot, did not recollect, or made a statement
trary to the evidence given by members of the co
as to what actually took place with regard to the passin
the by-law, while undoubtedly it was evidence to be
sidered, ought not to outweigh the clear, direct, and pos
testimony of the persons who were directly concerne
the matter in hand, and who give the reasons why the co
was taken which they say led to the by-law not being pa
on 22nd February, and to the meeting being adjourned
27th, when it was finally passed. They knew the law,
knew that the by-law could not be properly passed until
month after the first publication; a meeting was called
22nd February, and, according to the evidence of the r
corroborated by two other members of the council, I th
and two other ratepayers who were present, he called a
tion to the fact that they could not at that meeting
perly pass the by-law, and that thereupon the meeting
adjourned until the 27th following, for the purpos
finally passing it; that the meeting was held upon that
(the 27th) and the by-law then finally passed.

The circumstance that in the minute book of the co
it appears that the by-law was passed upon the 22nd
ruary, if the evidence had been pretty evenly bala
might have turned the scale in favour of the appellant,
it not for the circumstance that the evidence shews tha
minutes of the two meetings of the 22nd and the

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vere kept upon slips of paper, that they were not
ter each respective meeting, but that a young
no attended to that duty for the clerk, was given
nter in the minutes, and that she by mistake en-
resolution as to the final passing of the by-law as
ebruary.

uestion was one entirely of fact, and I think the
reponderates greatly in favour of the conclusion
the learned Chief Justice came, that the by-law
nally passed until 27th February.

result is that with regard to these matters the
has been prejudiced, the fact being, as he says it
se he has been unable to satisfy the Court of
ault lies with him. The by-law was finally passed
nd or 27th February—the 27th February, as we
uded—and he took no step with a view to attack-
some time in the month of October or November
It would be most unfair in such matters as these,
end upon recollection, that the appellant should
od a position in attacking the by-law as if he had
nptly when they would have been fresh in the
n of those who had dealt with them.

t know, even if these objections were entitled to
ether the case of Re Bolton and Town of Peter-
6 U. C. R. 389, referred to by the Chief Justice,
ny brother MacMahon has called my attention,
have amply justified, in the exercise of our dis-
refusing to quash the by-law (I am not referring
objection as to the by-law having been prema-
ed). In that case, the statute required that a
by-law should be inserted at least 4 times in each
printed within the limits of the municipality, and
refused to quash the by-law, under which a large
en borrowed, because the advertisement had been
times only in one of two papers. The learned
ice of the Court, the late Sir John Beverley
said: "We do not doubt our power to quash a
ere it is shewn to us that it has been passed
without some notice or other formality required,
ears to be essential to the right of the munici-
ss it. But where we interfere on that ground, it
onceive, rather under the jurisdiction vested in

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us at common law, than under the Municipal Act. where that is the case, we have a discretion not to inte on summary application, but leave it to the party comp ing, if he pleases, to test the validity of the by-law by r ing its operation, or by bringing an action for anything under it, as he may be advised."

As Mr. Haverson observes, this is not a money by but it is a by-law that has an important bearing upo rights of the ratepayers of the locality. The effect o by-law being quashed at the time when the application before the Chief Justice would have been to preven expression of the will of the people until another yea passed, and there sems to be, if the matter is not op explanation, some ground for thinking that the applic was deliberately delayed with a view to producing that e if the by-law should be quashed.

The same principle which warranted the Court i case just cited in holding that where money had been rowed upon the faith of the by-law the Court woul interfere, would justify us in this case in holding where the rights of the ratepayers with regard to the n of local option would be prejudicially affected to the e to which I have indicated, we should exercise our disc by refusing to quash this by-law.

With regard to the question of costs, the circumst referred to by Mr. Pettit might have afforded groun asking the Chief Justice to depart from the ordinar and not to impose the payment of the costs of the u cessful application upon the appellant, but if such a peal was made the Chief Justice has not given effect and there is no appeal from the exercise of his discret to costs. There is no ground whatever upon which we apply that consideration in dealing with the costs o appeal. The appellant has chosen, notwithstanding a sion against him, to go further and to appeal to this and there is no reason why, failing in that appeal, the nary result should not follow and the appellant pay the of it.

We think this appeal should be dismissed with co

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:, C.J. FEBRUARY 25TH, 1907.

WEEKLY COURT.

ONES AND CITY OF OTTAWA.

orations—By-law Establishing System for Col-Disposal of Garbage—Operation by Contractors within Municipality — Purchase of Land — e—Vote of Ratepayers—Limitation of Private nfiscation of Private Property.

to quash by-law number 2556 of the city of ground that it was illegal and in excess of owers of the corporation.

or, Ottawa, for the applicants.

, Ottawa, for the city corporation.

DGE, C.J.:—. . . The by-law is one for aintaining, and regulating a system for the disposal of ashes, refuse, and garbage in the assed under the authority of sec. 552 of the et seq., with which must also be read supple-es. 9, 10, and 11, as provided by the Munici-t Act of 1905, 5 Edw. VII. ch. 22, sec. 25. was passed on 8th May, 1906, and in pursu-corporation entered into an agreement with tors, bearing date 31st May, 1906, by which covenanted and agreed that they would for hree years dispose at a point or points out-all the garbage and refuse that might be corporation of the city of Ottawa, and de-named points in the said city or at other re dispose of the same.

ent is matter extraneous to the by-law itself, asmuch as it is necessary for a proper under-ne of the objections which are being made.

jection is that the by-law does not provide isposing of garbage and refuse collected by at a place or places within the municipality. at this is not a system, or something com-in that the collection is done in the first

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instance by the city and the operation carried on b
contractors. I do not find that it is any the less a sy
One of the definitions of a system is, "a number of t
or parts so connected as to make a complex whole."
a system may comprise widely different constitutive
or elements, as, for example, where a railway "system
cludes the conduct and management not only of rai
but of ships and hotels.

Then it is objected that this is not a disposal withi
municipality. I think it is a disposal within the
cipality. When the refuse is delivered at the points w
the city mentioned in the agreement, it is disposed of
in the meaning of the section. If the contractors,
carrying it away, create any nuisance in an adjoining
cipality, that municipality may no doubt protect itse
in Township of Barton v. City of Hamilton, 17 A. R.
and when that case arises it will no doubt be dealt wi
the proper forum.

The second objection is that the by-law does not pr
for the purchase or acquisition of such land, plant
buildings as are necessary and proper to establish
operate a garbage system. As to this the section is pe
sive. If the corporation can do what they wish to do
out acquiring such further plant, &c., they need not
themselves these powers.

The third objection is that the by-law permits the
ation of a scavenging or garbage system partly by co
and partly by municipal operation, a mode of ope
said to be not authorized by law. This point is to
extent involved in objection 1. I do not see anythi
the Act to prevent their "disposal" of the refuse
the municipality to the contractors, and I think the c
ation are not bound to adopt one scheme or the oth
its entirety; they may combine the two.

A further objection is that the by-law does not pr
any means of raising by a special tax or rate, or b
issue of debentures, or otherwise, a sum sufficient to d
the cost of the establishment and operation of the u
taking; with which may be considered objection numl
viz., that upwards of $2,000 has been expended b
municipality under the assumed authority of the b
in purchasing land and plant for scavenging, withou

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ng submitted to a vote of the ratepayers of the ty, and their assent being obtained.

sition of the city of Ottawa is different from y other city. The Public Parks Act, R. S. O. 233, was in operation there for several years. rs ago a government improvement commission tuted, and in 1902 (2 Edw. VII. ch. 54) the pro- hts, privileges, &c., theretofore vested in the arks management were transferred to the muni- ration of the city, who were authorized to enter eement with the Dominion government or Parlia- aying out, constructing, and maintaining parks, ives, boulevards, &c.; and for contribution from ne, by the corporation and the government, of of money as might be agreed upon.

ard of works at a meeting of council held on 5th , reported that they had considered the advis- acquiring land for use in connection with the system to be installed in the city, and recom- e purchase of a parcel of land consisting of 2.44 2,750 per acre, which report was received and the same meeting. If matters had continued ong the line thus suggested, there would have at deal of force in these objections. But at a council held on 2nd April, 1906, the board of orted recommending that their former report the purchase of land be amended so as to sub- words "for park and subway purposes," instead rds "for use in connection with a scavenging be installed in the city," and that report was d adopted. So that the corporation did not in e by purchase or otherwise any land for use in with a garbage collection system, nor had they plant or buildings on any land for use in con- h the said system; and these objections also fail.

th ground of complaint is that secs. 6, 7, and 12 by-law limit private rights and confiscate private a way not authorized by law. Objection 7 is that the by-law confers power upon the city engineer prohibit trade and to interfere with contractual hout any legal authority; and the eighth ground by-law creates a monopoly not authorized by law.

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The principles which the applicants desire to hav
plied in considering these objections are those laid dov
the two classes of cases represented by Regina v. Joh
38 U. C. R. 549, and by the Virgo Case, [1896] A. C
But the present case is quite different, because the re
tions which are here laid down are, "in the opinion o
public authority, necessary to prevent a nuisance," and
are, in my opinion, authorized by the statute, and withi
competence of the city council.

Application refused with costs.

FEBRUARY 25TH,

DIVISIONAL COURT.

CRONKHITE v. IMPERIAL BANK OF CANAI

Landlord and Tenant—Vault Door Placed on Demised I ises by Defendant—Annexation to Freehold—Removal Expiry of Term — Tenant's Fixture—Lease—Prov Short Forms Act.

Appeal by defendants from judgment of ANGLIN,
O. W. R. 18, in favour of plaintiff in an action for th
covery of a vault door which defendants removed
premises belonging to plaintiff occupied by defendan

J. Bicknell, K.C., for defendants.

F. W. Griffiths, Niagara Falls, for plaintiff.

The judgment of the Court (FALCONBRIDGE, C.J.,
TON, J., MABEE, J.), was delivered by

BRITTON, J.:—The defendants assert that the doo
chattel and is their property, and further that, even
a chattel, it was a tenant's fixture, and they had the
under their lease to remove it. . . .

In 1886 the defendants, being the tenants of
Howard, occupied the western store in Howard's blo
their banking business. The lessor constructed a vaul
defendants supplied a metal lining for the vault to

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oor in question, the door being an expensive one and bolts suitable for a bank vault. The door as described. On 1st April, 1890, defendants the same lessor, Alice Howard, the eastern store e block, and for defendants as her tenants she a vault there, defendants supplying the metal defendants moved the door in question from the the eastern tenement. Defendants' lease of the emises was for 10 years from 1st April, 1890. as made in pursuance of the Act respecting short ases, R. S. O. 1887 ch. 106. It contained a cove- epair," but excepted therefrom "reasonable wear nd damage by fire, water, tempest, and other act That covenant to repair was, by the extension, to fixtures and things thereto belonging or which during the said term shall be erected and made." contained the covenant to leave the premises in , subject to same exceptions as mentioned above, venant under the statute was "to deliver up the ogether with all buildings, erections, and fixtures good and substantial repair," etc., subject to the

the currency of this lease the lessor conveyed, the lease, to James Dickenson, and while the urrent and until 10th November, 1899, no ques- so far as appears, about the vault door or about or repair. The Act respecting short forms of amended as it now appears in R. S. O. 1897 ch. t the covenant to leave the premises in good was to leave them "with all buildings, erections, s created or made by the lessor thereon in good ntial repair," etc. On 10th November, 1899, de- tained from James Dickenson a lease for 5 years pril, 1900. Alice Howard, the original lessor, to that lease for the purpose of assenting there- t lease was under the Act respecting short forms It contained the covenant as to leaving at ex- term, and was subject to the proviso as follows, hat the lessee may remove its fixtures." On 10th 1904, a further lease was made by James Dick- which Alice Howard was also a party, for 18 m 1st April, 1905. This lease also contains the hat the lessee may remove its fixtures." This

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brought defendants' tenancy to 1st October, 190
February, 1906, and during the tenancy under the last
defendants removed the vault door. After the leas
before the removal of the vault door, plaintiff purchas
freehold from Dickenson subject to defendants' lease.

The first question that naturally arises is, was the
door, as between the landlord and tenant, ever a fixtu
was it a chattel, and if so the property of the bank.

The trial Judge is quite correct in saying that th
no evidence of any express agreement at any time be
lessor and lessee about the ownership of the door, b
the learned Judge says, there certainly was some
standing that the lessees should furnish it.

It appears to me that the fair inference from the
puted facts is that the lessees should be entitled to r
the door—should own it. That kind of door was ma
bank purposes, not necessary for a tenant occupyin
premises as a store or for a law or real estate office.
when defendants moved from the western to the e
end of the Howard block, the vault door was moved,
ently as of right, by defendants, certainly without let o
drance from the lessor. True, the new premises bel
to the same lessor, but the fact of the removal shew
it was not considered necessary for the first vault
other tenants than the bank of the western end
block. . . .

[Reference to Wood v. Hewett, 8 Q. B. 913.]

The general rule is always open to variation by
ment.

The trial Judge determined that the vault door in
tion was a tenant's trade fixture, and as such, and o
such, removable, so that if defendants were, at the ti
removal, in possession under the original lease of 1890
could rightfully have removed it. Plaintiff wholly a
to that proposition, so the question is whether defe
had not the right of removal during the currency
lease dated 12th November, 1904.

I state, because I think it fairly arguable, that
dants may have had the right to remove this tenant's
fixture when they did, apart from the express provisi
the leases of 1899 and 1904.

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rities are that tenant's fixtures are removable
ne term, or some further period of possession
, during which he holds the premises under a
der himself a tenant, or during what has been
escence upon or an enlargement of the term.
ny cases cited go farther than to establish the
t quoted, they hardly govern the present case,
was the holding by defendants of the prem-
ne further period under a right to consider
nants; but they were tenants in fact for the
l.

, called by Baron Parke in Mackintosh v. Trot-
V. 184, "an excrescence upon or enlargement
' is an enlargement of the tenant's rights.
other right to a longer term during which
e a trade fixture, then during this undefined
of the term, if it exists, he is at liberty to
have not found any case that goes so far
express terms that a tenant's admitted right
ring a tenancy under a lease is lost by merely
ew lease for a new term, commencing at the
the last term, of the same premises, where
s been continuous. That, however, is con-
intiff, and some text-writers state that to be

ite an exceptional case in its facts, and, even
a surrender, or new lease taken, without ex-
ing for and preserving tenant's right to fix-
still to be considered the question of what is,
stances presented, reasonable time after sur-
er expiration of time, for removal of these.
never out of possession of defendants; it was
ession on the premises and removed off the
ng their term. Why should not any time be-
ration of the final term not be a reasonable
oval? See Woodfall's Landlord and Tenant,
17, and cases there cited.

gued that, even if defendants had the right
them under the lease of 10th November, 1899,
remove would be lost, and could not be exer-
e surrender of that lease, and it is said there
der in terms in the lease of 12th November,

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The clause is: "It is further expressly agreed b the parties hereto that, in consideration of the grant this lease, the extension of the lease hereinbefore e into between the said parties dated the 10th day of N ber, 1899, is hereby surrendered."

That, in my opinion, is not a surrender of the leas the term. It was not intended to be such. The int is only material as a possible aid to the construction clause. The lessees did not in fact give up, but con in possession until the end of the term and paid re is an express giving up of any right of extension of t term under the old lease; but no extension under th required, as defendants got the extension under th in which the so-called surrender clause appears.

But, apart from the points so far discussed, I opinion that defendants are entitled to succeed up agreement in regard to fixtures in the lease of 1899, an tinued in the lease of 1904. This is a case in whi parties could agree to vary the strict position in which wise they would stand to each other. Concede that tenant renews his lease he must be careful to preser right to remove fixtures, and that without express s tion he may lose his right. These leases were exp made under the Act respecting short forms of leases. words of the proviso are, "provided that the lesse remove its fixtures," and these words mean "that the may, at or prior to the expiration of the term hereby ed, take, remove, and carry away from the premises tures . . . or other articles upon the said prem the nature of trade or tenant's fixtures or other belonging to or brought upon the said premises by th lessee . . .:" R. S. O. 1897 ch. 125, 9th form of nant.

By the judgment appealed from there was the ri removal of the vault door at any time during the ter piring on 1st April, 1900, or if that lease was surren by the new lease of 10th November, 1899, the right moval existed until that date. In my opinion, the ri removal did not cease with the execution of the new because of the proviso contained therein. This sho regarded as a special agreement continuing to the less right of removal. If I am correct in this, the right wa ther continued by the lease of 10th November, 1904

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udge considered the provisoes in regard to
tricted in their operation to fixtures placed
ses by the lessees subsequent to the respec-
hese demises and to other fixtures, if any,
premises, which the parties might agree
ed lessee's fixtures." No case was cited so
proviso. The wording of the statute seems
estricted. The door was a tenant's fixture
fendants, and was brought upon the prem-
its. In the absence of any proviso or agree-
se of 1st April, 1890, in regard to fixtures,
undisputed facts, it would, perhaps, not be
treat this proviso as an express agreement
question belonged to the lessees. It is not
so far, if my interpretation of the proviso
o regard the insertion of the proviso about
new lease in 1899 and in the lease in 1904
tipulation as to what were in fact tenant's
pon the premises and in possession of and
fendants.

ved with costs and action dismissed with

MASTER. FEBRUARY 26TH, 1907.

CHAMBERS.

S v. CANADIAN PACIFIC R. W. CO.

ttlement of Action by Parties — Depriving
olicitor of Costs—Collusion—Fruits of Liti-
ice of Lien — Authority of Solicitor—Re-

laintiff's solicitor for an order that defend-
plicant's costs, on the ground of a settlement
ntiff without the applicant's knowledge.

son, for the applicant.

r, for defendants.

R:—The facts are fortunately not in dispute.
hat the action was begun on 20th July last, to

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which defendants duly appeared; that plaintiff's so
notified defendants and their solicitors not to mak
settlement without the privity of plaintiff's solicito
that settlement was made before delivery of statem
claim, and on some day in August, for $225.

A decision in these cases in favour of the solicit
quires an affirmative answer to two at least of these
questions: 1. Was there any notice of his lien given
other side? 2. Were there any fruits of the action? 3
there any collusion to deprive the solicitor of his co

That collusion must be clearly proved and will not
ferred is shewn on the one hand by The "Hope," 8 P. I
and on the other by In re Margetson and Jones, [1897]
314. That there must also be fruits of the action o
ceeding is shewn by Bellamy v. Connolly, 15 P. R. 8
cases cited. That there must first of all be "notice
defendant by the solicitor that his costs are unpaid
that he looks to the proceeds of the action for payme
shewn by the concise yet exhaustive judgment of Ric
J., in Brown v. Conant, 2 P. R. 208. Where there ha
a settlement of a pending action by payment of such
stantial sum as $225, it would be difficult to say there
no fruits. It seems quite distinguishable from
Morrison, L. R. 4 Q. B. 153, and similar cases cited b
Walker.

It is clear, however, that there is no proof here o
collusion as defined in The "Hope," supra. . . .

But the case must be decided on the ground that
was no notice of lien given here at all. As was sa
Richards, J., in Brown v. Conant, supra, "It is the
which creates the right." That notice must be clea
explicit, as it amounts to notice of an equitable i
brance by operation of law on any fruits of the litigat

It may be safely assumed that the defendants' sol
had no part in this settlement, and, while the motion
on the law be dismissed, it will be without costs.

The defendants' motion to have the plaintiff's so
ordered to pay the defendants' costs, on the ground o
of authority, was on the argument dismissed with co
he shewed a written retainer, confirmed by affidavit o

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o, and such motions should not be made in any
rest cases.

. FEBRUARY 28TH, 1907.

WEEKLY COURT.

RE LIVINGSTON.

*ruction—Bequests to Daughters—Payment De-
ll Certain Age Reached—Death of Daughter un-
—Vested or Contingent Interest—Expressions in*

by the executors of the will of John Livingston,
r an order determining a question as to the dis-
part of the estate, arising upon the construction

ator died on 21st May, 1896, leaving a will by
ected that the sum of $70,000, being the amount
ance upon his life, should be divided as therein
10,000 was to be set apart and the interest
d to the testator's wife, and the remaining
to be divided equally among his children share
ike and paid to them as thereinafter mentioned.
my estate and property shall be disposed of as
,000, in addition to the said sum of $10,000 of
ce money, shall be set apart and the interest
to my said wife as long as she shall remain my
the rest and residue after all my just debts,
testamentary expenses, shall have been paid,
ided between my children as follows, one third
ally between my daughters and the remaining
qually between my sons. . . . And my will
o case shall either of my children receive any
erty or moneys given to them in this my will,
id insurance moneys, before attaining the age
and that the interest of each child's share shall,
l is of the age of 21 years, be paid to such child,
of my children shall at the time of my decease
age of 21 years, my executors hereinafter named

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shall and may expend such portion of the interest
such child's share for his or her benefit as they shall
proper, until he or she shall attain said age of 21
when the interest shall thereafter be paid to such
And my will is that it shall be entirely in the discret
my said executors to pay each of my said children his
share of my estate and property, including said insu
moneys, on attaining the said age of 30 years, or to
the same and continue to pay such child the interest
or her share as hereinbefore directed until attaining
age, or to pay such child a portion of his or her shar
retain the balance, paying the interest on such balanc
I give my said executors full discretion to retain such
or a part thereof, and until such time as they shall
most advisable and for the benefit or advantage of
child for them to pay the same. And my will is th
moneys invested in the partnership business wit
brother James Livingston shall remain in said busin
long as my said brother shall desire, . . . and th
nual profits therefrom and from my share of a
property of the said partnership shall during such ti
disposed of as follows: in case the said annual profits
in any year be 10 per cent. or less, a sum equal to on
of the profits upon one third of my interest in th
partnership shall be added to the shares of my daug
and the remainder of the profits be added to the sha
my sons, and upon the dissolution of the said partn
and the winding-up of the same, the amounts so ad
the different shares shall be paid to those entitled
same manner and upon the same terms and subject
discretion of my executors as to time of payment as h
before mentioned. And while the said moneys sh
main in said partnership business, my sons shall ha
right at any time to purchase my daughters' interest
interest of either of them therein, and in case my dau
or either of them shall at any time desire to sell their
interest therein, my sons shall have the first right c
chase and have the refusal thereof before the same
sold to any other person or persons."

The question for decision was whether the inte
Annie Louise Meyers, a daughter of the testator, wh
before attaining the age of 30 years, was a vested or
contingent interest under the will.

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Carthy, for executors of John Livingston.

Nesbitt, K.C., and A. M. Stewart, for surviving ghters of testator.

son, for infant child of deceased child.

ray, Listowel, for executor of deceased child.

J.:—I have read all the authorities cited by while in some of them the provisions of the nsideration was something like the will in ques- ot be said that in any of them the resemblance as to furnish a precedent for this case.

reading of the will convinces me that it was of the testator that the gifts to his children e contingent, but should be absolute and vest s death, qualified by the enjoyment of the pos- e corpus being deferred until they should re- ain the age of 30 years, and then subject to of possession being further delayed until such xecutors in their discretion should "think most for the benefit or advantage of such child for the same."

nk that, tested by established rules of construc- ator has used language which effectually carries ntion. As evidencing such intention, I refer to features of the will: first, the use of the erty or moneys given to them in this my will" deferring payment over; second, the provision of interest to the beneficiaries on each share er; third, the absence of any provision dispos- are of any child dying before attaining the age while there is a gift over of a portion of the to the wife in the event of her marrying again; rovision giving the sons the first right to pur- ughters' interest in the partnership business, recognizing the right of the daughters to sell smissibility of their shares.

ment of counsel for the surviving sons and s, in effect, that there was no gift except in the pay, and that the words "equally divided be- ildren share and share alike and paid to them er mentioned" made both the gift and pay-

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ment over contingent on the legatee attaining 30 yea
age; and in support of this view, Merry v. Hill, L. R. 8
619, was cited. In that case Malins, V.-C., at p. 624, r
to Leake v. Robinson, 2 Mer. 363, as establishing a
of Court " that whenever you fairly come to the conclu
upon the construction of the whole language of the
that the gift is to be found in the direction to pay o
vide, then the attainment of the age at which that pay
or division is to take place is a condition precedent to
vesting."

Other recent cases were cited in which that rule of
struction is also adopted.

Assuming the rule to be well established, it ca
think, have no application to this will, inasmuch as here
provisions for division and payment relate to diffe
times. The former, which alone involves the gift,
relate to the time of the testator's death, as respects
insurance money; and as respects the residue, as soon th
after as the executors are able to ascertain the amoun
the respective shares. At this period the right to the
quest is complete, but the time for delivery over of po
sion of the same is postponed until the beneficiary at
30 years of age, interest in the meantime upon the s
being paid as of right to the beneficiary.

Hanson v. Graham, 6 Ves. 239, and In re Gossling,
ling v. Elcock, [1903] 1 Ch. 448, establish a rule of cons
tion which is applicable to the language of this will,
accords, in my opinion, with what was the testator's in
tion. That rule is, that where there is a gift by will
share or residue to be paid or transferred to the legate
his attaining a particular age, with a direction that in
meantime the income of the share shall be applied fo
maintenance, the share is vested and not contingent.

The order will therefore be that the share of th
ceased daughter was vested and is payable to her legal r
sentatives.

The costs of all parties out of the estate.

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FEBRUARY 26TH, 1907.

TRIAL.

HOWLAND v. MACDONALD.

-Trust Deed—Will—Action to Set aside—Power ation — Consideration—Solicitor's Advice—Im- ce—Reformation—Mistake—Intention of Settlor ce—Examination de Bene Esse—Notice.

egun by Sir William Pearce Howland (and con- is executors after his decease) for a declaration sts contained in the deed of settlement dated ber, 1898, had been effectually revoked, or, in ive, for reformation of the deed by eliminating erefrom or declaring them to be inoperative and e the same were not intended to be inserted were inserted therein by mutual error and mis-

ls, K.C., for plaintiffs.

ith, for defendant Macdonald, the trustee.

ss and Featherston Aylesworth, for other adult

arsh, K.C., for infant defendants.

J.:—. . . In pursuance of an ante-nuptial he late Sir William Pearce Howland, on 15th , made his will, whereby he devised his one half he Lambton Mills property to the Toronto sts Corporation, as executors and trustees, upon nerein expressed; the income to be derived be paid to his wife during her life, and after ch income to be paid to his son Oliver Aiken ring his lifetime, and upon his death or upon his wife, if she survived his said son, then the e sold and converted into money, and the pro- divided amongst any children and the issue of of his said son Oliver Aiken Howland who are g, per stirpes, and if there be no such children uch children, then the proceeds to be divided

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among the children of his late son William and the i
of his children who are then surviving, per stirpes.

In 1897 Sir William assumed, by a subsequent wil
revoke the will of 15th August, 1895; and in March, 1
he consulted the late Mr. Barwick, who, it would app
advised that the former will of 15th August, 1895, sh
be revived and confirmed by will and deed of settlemen

On 17th March, 1898, Sir William duly executed a
ther will, which recites the will of 15th August, 1895
cites that the will of 1897 had been revoked and destro
and that he desired to revive and confirm the first will,
proceeds: "I do hereby revive and confirm the said wi
15th August, 1895, which will is hereunto attached, a
declare that the same shall operate and be construed a
all persons and things as if made with the intentio
carrying out such settlement, and as if I had made the s
on this 17th day of March, 1898."

From the various entries made by Mr. Barwick in
ordinary course of business of his interviews with the t
tor, it appears that he advised both Sir William and I
Howland that there should be a deed of settlement execu
He then received instructions to draw the will in the m
time reviving the original will of 15th August, and a t
deed to be subsequently prepared and submitted. This t
deed was drafted on 21st March, and a number of interv
were had with the testator in regard to it, and modificat
were made from time to time. . . . From the evid
it is clear that great care and pains were given to the
ter, both by the solicitor and his client, in settling
terms of the deed of settlement now in question; and
ally, on 23rd December, 1898, it was duly signed by
parties, namely, Sir William, his wife, and defendant J
Macdonald, trustee. The document recites the marriag
15th August, 1895; that immediately after the marriage
said party of the first part made his will, which wa
tended to operate as a settlement upon the party of
second part, and which settlement was made in consi
tion of her marriage to the party of the first part,
whereas the party of the first part is desirous of execu
this indenture with a view of effectually confirming
carrying into effect the settlement set forth in the said
etc. The property in question is then settled as menti

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'he deed of settlement contains no power of

e, 1900, Sir William executed a further will
ıde certain further provisions in favour of his
ition to the various properties settled upon
y deed of settlement dated 23rd December,
vill also contained other provisions not ma-
resent case.

ptember, 1901, Sir William executed a further
ntains this clause: "I confirm the deed of
ed 22nd December, 1898, so far as the same
s on my said wife during her natural life, but
ions therein contained to take effect after the
said wife, I revoke and disannul the same."
the residue of his estate, subject to the trusts
ed of settlement in favour of his wife, to
Howland to receive the income for life with
ntment and advancement—with power of sale
f both real and personal estate. And on the
h September, 1901, Sir William executed a
the trust in the said deed of settlement in
children of William H. Howland.

ended by plaintiffs: (1) that such revocation
valid and effectual, or (2), in the alternative,
of settlement should be reformed.

nion that plaintiffs have failed to make out a
on either of these grounds.

doubt that the will of 15th August, 1898,
ursuance of an ante-nuptial agreement, and
g in the evidence to lead me to think that it
s the intention of the testator at the time.

e testator might have revoked any part of the
tained in the will not affecting the interests
am not called upon to decide. No doubt, the
e testator to confirm the settlement which he
vill, by reason of its having been revoked, was
cement for the deed of settlement in ques-
s made after fully advising with his solicitor,
ad had many interviews and much correspon-
thereto—when draft after draft had been
after he had had the document in his own
a length of time. The document which was

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actually signed originally bore date in July; it was
fact executed until 23rd December. So that we ha
family settlement, purporting on its face to be made
sideration of marriage, executed after the fullest con
tion and advice of solicitor. Can such a document
voked at the will of the settlor, in the absence of an
gestion of fraud or misrepresentation? I think not

[Reference to Tucker v. Bennett, 38 Ch. D. at
15; Davenport v. Bishopp, 1 Phillips 698; In re Camer
Wells, 37 Ch. D. 32; Wollaston v. Tribe, L. R. 9 E
Paul v. Paul, 19 Ch. D. 47, 20 Ch. D. 742; Hall v. Hal
8 Ch. 430, 439; Toker v. Toker, 3 De G. J. & S. 487

In the present case I can find nothing in the ev
to lead me to the conclusion that the deed in questi
either unreasonable or improvident. Upon this g
therefore, I think plaintiffs must fail.

Then as to the question of reformation. . . .

[Reference to McNeill v. Haines, 17 O. R. 485.]

Here, so far from there being evidence which satis
that there was any mistake either in the will or in the
ment, I have no doubt that at the time they were ma
expressed truly what was in the mind of the settlo
that it was owing to subsequent and changed conditio
he desired to vary the terms of the settlement. Tho
no mistake, so far as I can see—no evidence of such
take as a Court ought to act upon. Years afterwa
testator and settlor, looking back upon the facts, is o
ion that he did not intend to make an irrevocable
settlement, but I do not think that evidence amounts t
than an opinion or impression of what his intention
He answered certain leading questions, which in for
ded to shew that he had no intention to do more tha
a settlement in favour of his wife, reserving the po
revocation to himself, subject to her interest. B
trust having been fully executed, and intended at th
as I find it was intended, to be as therein stated, the
foundation whatever laid for rectification upon the
of error and mistake. It is almost inconceivable to
there could have been any error or mistake. He
exercised great care both in the preparation of the
deed of settlement. The deed of settlement was es
prepared and revised both by himself and his solicit
the utmost care. Plenty of time was taken for him

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nd suggestions were from time to time made by
solicitor. The solicitor was an old friend, with
had been for many years acquainted, and his con-
gard to the whole matter from first to last satis-
thout any doubt, that the deed of settlement truly
d his intentions at the time.

ss strenuously objected to the evidence of Sir Wil-
and taken de bene esse being received as against
inasmuch as they did not receive proper notice
mination de bene esse before the evidence was
that the Master had no power to appoint the
tive of the infants to act for all parties. I think
ubtful whether his evidence can be received as
clients, but, having regard to the view I take of
, I do not find it necessary to decide this question.

dismissed with costs.

J. FEBRUARY 26TH, 1907.

TRIAL.

TROY v. HAMILTON.

*—Declaration of—Dissolution—Asset of Partner-
ease of Land Taken in Name of Defendant—As-
t of Lease as Security—Redemption—Reference*
.

to establish a partnership and for dissolution
d other relief.

Iacintosh, for plaintiff.

radford, for defendant Hamilton.

Ioss, for other defendants.

N. J.:—Plaintiff for some time prior to 10th
06, had been in the sign-advertising business,
on not in a very extensive way, but carrying it
ame of the "Echo Sign Company." In looking
having an eye to any property eligible for the
displaying signs and posters, plaintiff noticed the

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property called "the gore" at the junction of King
Queen streets in the eastern part of the city of Tor
belonging to the trustees of the Toronto General Hos
Plaintiff called the attention of defendant Hamilton to
and proposed that a lease of this property should, if pos
be secured, and that an advertising business shou
carried on by Hamilton and plaintiff. Defendant Ham
entered upon negotiations for the lease, and obtaine
Hamilton was personally acquainted with the secreta
the hospital board, and probably by reason of this was g
ed a little grace in payment of the first rent, which pla
alone might not have obtained.

On or about 10th March, 1906, an arrangement was
by which the lease could be had, provided $750 cou
raised for payment of one year's rent in advance. Ne
plaintiff nor Hamilton had the money for this purpose.
lease was signed on that day, but was left in escrow
rent paid, and it was understood that it might so remai
longer than a month. Then plaintiff and defendant H
ton entered into a partnership agreement of the same
10th March, 1906. The material part of that agreem
that the parties should be co-partners in the business o
ing of sign-advertising, under the name, style, and fi
"The Echo Sign Company," for 21 years from 1st M
1906, business to be carried on at the city of Toronto.

Defendant Hamilton was to contribute towards the
tal stock of the company a lease of the gore lot at the
tion of King and Queen streets in Toronto (the lease
mentioned), and Troy was to contribute his business co
tion and trade, to the partnership firm—the expense
losses were to be borne equally, and profits shared equa
and the management and control, subject to certain st
tions in the agreement, was given to plaintiff. As
as the lease was made and articles of partnership si
plaintiff attempted to make contracts for placing sign
advertisements on the boards to be placed upon this lot.
time and labour were expended, but not much accompl
Plaintiff says that not much could be accomplished unt
boarding was erected, so that patrons could see what
would get for their money. That seems to me reasonable. A
culty presented itself about getting money to pay the
year's rent. I think Hamilton understood that pla
could not get this money, and that it was left for Ham

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He was not successful within the month allowed
er, and Hamilton got the further extension of
inally obtained $750 from defendants Lawyer and
ning the lease as security for it. Lawyer and
acting together, although the assignment was to
e. This assignment, dated 11th May, 1906, was
he right of the assignor to a re-assignment on
$750 and interest at 6 per cent. per annum, at
or before 11th July, 1906.

is assignment it is alleged that an agreement
into between Lawyer and Norris and Hamilton,
r sum should be advanced by Lawyer and Norris
ose of erecting the boarding and fitting up the
carrying on the business of advertising, and that
Norris should incorporate a company for doing
ng business and other business connected with
, and that they should give to defendant Hamil-
fined amount of stock in the company to be so
. Up to 4th June plaintiff and Hamilton had,
le they did, worked harmoniously. . . . On
fendant Hamilton decided to have nothing more
laintiff, and he caused to be written the letter of
This letter came as a surprise to plaintiff. I
sition taken by Hamilton was quite unwarranted.
e does not shew that the partnership agreement
d by any fraud, deceit, or misrepresentation on
plaintiff. Defendant Hamilton knew what plain-
and business connections were. Whether plain-
e much or little up to the time the first year's
id and lease secured, he had acted substantially
e with the agreement. After the lease was "fin-
was said, plaintiff assisted in giving information
tiating for the erection of the boarding, but de-
milton had determined to get rid of plaintiff.
fact that the partnership was consummated, and
eement was not obtained upon the representation
nding as set up in Hamilton's statement of de-

fendants Lawyer and Norris. They did not ad-
statement of defence that the assignment was
nortgage. The assignment itself is clearly only
for the $750. There were further negotiations
signment was executed. In my opinion, these

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negotiations did not result in an agreement. There w
ing agreed upon as to the amount of capital stock in t
pany to be formed or how it was to be paid—nothing
as to the amount Hamilton was to get, nor as to the
Lawyer and Norris should advance. From what was
done by Lawyer and Norris, the clear inference can b
that a definite agreement was to be made, but none
made, owing, no doubt, to the action taken by plaint

Defendants Lawyer and Norris set up an agreeme
is not established. They are not guilty of any frau
are entitled to hold the lease for the full amount of
made by them with interest on same from dates of
vances. Had they admitted their position as I find
they would be entitled to costs of defence, but attem
hold the lease as against plaintiff disentitles them to
of the action.

Defendant Hamilton should pay plaintiff's costs
judgment.

The partnership articles provide that either part
determine the partnership by giving 3 months' notic
other.

I find that there was a partnership entered into
plaintiff and Hamilton, as evidenced by the agreemen
March, 1906. That partnership should be dissolved
September, 1906. The lease dated 10th March, 190
the trustees of the Toronto General Hospital to d
Hamilton . . . is a partnership asset.

Owing to the terms of the lease, there may be so
culty in working out plaintiff's remedy. He is en
redeem for the benefit of the partnership. Defendan
yer and Norris are entitled to hold the lease for any
advance necessary for payment of rent or to protect s
or leasehold property, and interest from the time
payment.

Reference to the Master in Ordinary to make a
sary inquiries, take all necessary accounts, and t
in subsequent proceedings in regard to said lease an
winding-up of the partnership in the pleadings ment

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FEBRUARY 26TH, 1907.

DIVISIONAL COURT.

BELL AND CITY OF STRATFORD.

orations—By-law Regulating "Eating Houses" Closing—Sunday—Form of By-law—Power

ouis Campbell from order of MABEE, J., ante an application to quash secs. 2 and 3 of by-assed by the council of the city of Stratford on 06, providing that all eating houses in the sed between 1 a.m. and 6 a.m. every day, and er 7 p.m.

was heard by FALCONBRIDGE, C.J., BRITTON,

leton, for appellant.

tson, Stratford, for the city corporation.

:—I think the case is concluded by two cases d were cited upon the argument below, but eferred to in the judgment. . . .

to Re Greystock and Municipality of Otona-m, 1855), 12 U. C. R. 458, and Re Barclay ty of Darlington (Easter Term, 1854), 12 U.

cisions be inconsistent, we should follow the Greystock case. Being decisions of the same deed the decisions are given by the same ustice, Sir John Beverley Robinson—and with-s of each other, it is to be expected that there reconciling them. . . . The innkeeper has event persons using his inn and lodging there e time; the lodger without express statutory not be prevented from exercising his common eating and drinking what he pleases and when if the guest might drink out of a bottle he it would be unreasonable to say that the land-t supply him with liquor. Therefore, such a hat would be bad. But the guest has no com-to a bar or to a bar-room; the innkeeper a bar or bar-room. and if he has one he is permit every guest to use it; therefore, there

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is authority in the municipality to prevent the op
bars at any hour or upon any day they think prope
reasonable limits.

If the cases are irreconcilable, and the Greyst
governs, I think the decision appealed from is right
there is something in the form of the by-law which
it invalid, and this I shall consider later. If the
of reconciliation I have suggested be the true me
must inquire further.

And first as to the form. The statute governing
O. 1897 ch. 223, sec. 583 (34), which gives auth
councils of such cities as the city of Stratford to pass
—"34. For limiting the number of and regulating vi
houses, ordinaries, and houses where fruit, oysters, c
victuals are sold to be eaten therein, and all other p
lodging, reception, refreshment, or entertainment
public." On 29th December, 1887, a by-law was passe
enacts that it may be cited as "The Consolidated By
the City of Stratford, 1886," which by sec. 350 enact
number of victualling houses, ordinaries, and house
fruit, oysters, clams, or victuals are sold to be eaten
and places of reception, refreshment, or entertain
the public (hereinafter included in the term "eating
is hereby limited to 20." Section 352 provides:
keeper of such eating house shall, before opening the
receiving the public therein, apply for and obtain
therefor as herein mentioned." It will be noticed
some reason the council in sec. 350 introduced a
their own, "eating house," and gave it a definition
that expression should include all the various classes
which are mentioned in R. S. O. 1897 ch. 223, sec. 5
if, as I suppose, "places for reception of the publ
include places of lodging for the public. . . .

The by-law now attacked provides in sec. 1: "Eve
house in respect of which a license is granted as req
sec. 352 of the Consolidated By-laws of the City of
shall be," etc.

Sections 2 and 3 are set out in the report of t
ment below.

It sufficiently appears, I think, that the provisio
S. O. 1897 ch. 223, sec. 583 (34) are being appealed
the form of the by-law now attacked is well enough.

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the power to pass such a by-law. It is clear
s the absolute right at the common law to enter
ouse;" that must depend upon the consent, ex-
ed, of the owner of such house. And if the
gested between the two cases above be the cor-
llows that this by-law is within the powers of

h cases relied upon by Mr. Middleton are nihil
ik. . . .

d Hebble Navigation Co. v. Pilling, 14 M. &
R. 660, Macdonald v. Lochrane, 51 J. P. 629,
Watson, 51 J. P. 660, 57 J. P. 366, referred to
ned.]

es cited in the judgment below may be added
tters, [1900] 1 Ch. 10.

eferred to in the judgment below as Krun v.
6] 2 Q. B. 99, should be Kruse v. Johnson,
. 91. The same case is also cited by the wrong
a v. Levy, 30 O. R. 403, 405. . . .

should be dismissed with costs.

J., gave reasons in writing for the same con-

GE, C.J., concurred in dismissing the appeal

FEBRUARY 26TH, 1907.

C.A.

THUR AND RAINY RIVER PROVINCIAL ELECTION.

PRESTON v. KENNEDY.

Elections—Controverted Election—Scrutiny—
sts Act—Finality of Lists—Infants and Aliens
Voting on Transfer Certificates Signed in
rrupt Practice—Striking off Votes of Persons
in—Agency—Other Votes Struck off.

H. W. Kennedy, the respondent to the original
the decision of TEETZEL and ANGLIN, JJ.,

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two of the Judges on the rota, before whom the proc
on the scrutiny were concluded. Much of the history
case is to be found in the reports of previous appea
motions in the same case, 8 O. W. R. 46, 419, 606, 12
R. 453, 508, 13 O. L. R. 17.

The two Judges named proceeded with the scrut
the 7th, 8th, and 9th January, 1907, and on the 15th
same month gave their certificate or report setting for
they had struck off and disallowed to the respondent
nedy) 32 votes, and that they had struck off and disa
to the petitioner 7 votes, and that the result of the s
was that the petitioner had a majority over the respon
14 votes, and that the petitioner was elected and sh
returned as member for the electoral district. The
certified that 23 persons, whose names they set out, v
the election, not being British subjects, and that one
viz., Robert B. Langstaff, voted, not being of the f
of 21 years. From the evidence and proceedings
scrutiny it appeared that the names of these 24 person
on the voters' lists for the subdivisions at which thei
were recorded; and the Judges held that they were bo
authority to rule, and they did rule, that upon a scruti
voters' lists were final and conclusive evidence of the r
the persons named therein to vote, and they refused t
into any inquiry respecting the votes of the persons na

The respondent now appealed from this ruling, as
from some other rulings in regard to voters whose vot
struck off and disallowed to the respondent.

The appeal was heard by MOSS, C.J.O., GARROW
LAREN, MEREDITH, JJ.A., and CLUTE, J.

H. M. Mowat, K.C., for the appellant.

I. F. Hellmuth, K.C., and W. J. Elliott, for the pet
respondent upon the appeal.

MOSS, C.J.O.:—It was admitted that if the Judge
to an erroneous conclusion as to alien and minor vo
matter must needs be remitted to them for further in
tion.

Manifestly, therefore, this is the first question to
sidered.

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islation dealing with voters and their qualifications, and completion of voters' lists, voting at elections, ing results of polls, is to be found mainly in the oters' Lists Act, R. S. O. 1897 ch. 7, the Manhood egistration Act, ch. 8, the Ontario Elections Act, the Ontario Controverted Elections Act, ch. 11. ne main parts of the Ontario Elections Act had a r statute books long before any of the other Acts But, looking at the fact that they deal with the ct, and having regard to the frequent references to that occur, it seems plain that they are in pari d should be read with reference to one another as g parts of a code of legislation on the subject of The voters' lists, prepared, revised, and transmit- rdance with the provisions of the Ontario Voters' and the Manhood Suffrage Registration Act, are upon which, in a large degree, the title of per- e at elections to serve in the Legislative Assembly ed. From them are prepared the poll books for the odivisions in the electoral districts containing the very person appearing from the voters' lists to be vote within the subdivision in which he is named.

5 of the Ontario Elections Act it is enacted that, he provisions of the Act, no person shall be entitled any election unless his name is on the voters' list under the Ontario Voters' Lists Act or prepared Manhood Suffrage Registration Act. Thus the s become the source from which the right of a senting himself and claiming to be entitled to ertained in the first instance. Protection against istake is given by provisions for tendered ballots. vise the question of the right to vote is settled at reference to the certified list. And by sec. 119 of n Act it is enacted that no returning officer or de- ning officer shall grant, make, or enter into a scru- e votes given at an election.

8 of the same Act, under the heading "Who may entered on Revised Voters' List of a Municipal- enacted that "every male person of the full age of subject of Her Majesty by birth or naturalization, qualified under this Act, and not otherwise by law from voting, shall, if duly entered on the list of

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voters proper to be used, be entitled to vote at electi
serve in the Legislative Assembly of this province."

Two provisions follow not material to set out.

Sections 9 and 10 enact in similar terms with resp
persons "when entered on voters' lists prepared und
Manhood Suffrage Registration Act," and "when ente
voters' lists prepared for territory without municipal org
tion."

It may be assumed, though the point was not y
without a struggle (see North Victoria Election (I
H. E. C. 584, where the voter's qualification was deter
by reference to the provisions of the Ontario Act 32 Vi
21, sec. 5), that if this was the whole legislation c
subject the fact that a person's name was on the r
voters' list would not, of itself, preclude an inquiry whet
was of the age of 21 years or a British subject, or preve
vote being struck off on a scrutiny if he was found to
infant or an alien. But other parts of the legislation ha
important and material bearing on the question.

By sec. 24 of the Ontario Voters' Lists Act it is e
that every voters' list which, under the Act, is certif
the County Judge shall upon a scrutiny be final and
clusive evidence of the right of all persons named ther
vote at any election at which such list was or could
been legally used, except (1) persons guilty of c
practices, (2) persons who have become non-residents
the list was revised, and (3) the persons who under s
to 7 of the Ontario Election Act are disqualified and i
petent to vote.

By sec. 2 (5) of the Voters' Lists Act it is declared
unless a contrary intention appears, the word "scrutiny"
mean any scrutiny of the votes polled at an election
the meaning of sec. 76 and the next succeeding 9 secti
the Ontario Controverted Elections Act.

There is nothing to indicate a contrary intention, n
to deprive the language of sec. 24 of its full force and
as applied to a scrutiny under the Controverted Electio
How then is the ordinary meaning of the words "fin
conclusive evidence of the right of all persons named t
to vote" to be avoided? By their terms they forbid v
set forth in the certified list to be overcome by any ev
that it is otherwise. They shut out all inquiry, sav

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3 specified exceptions, being entered into in the
rutiny under sec. 76 and the following 9 sections
o Controverted Elections Act. The emphatic de-
ec. 24 of the Voters' Lists Act is as fully incor-
secs. 76 et seq. of the other Act as if it actually
of one of them. And the Judge conducting a
r these provisions, as altered or amended by 62
) ch. 4, sec. 14, has no authority to investigate
ote of one whose name is on the list, save in the
s. Whatever may be the fact, therefore, as to
e or nationality, it is not inquirable into once
ewn to be on the proper certified list of voters.

nal of sec. 24 was first enacted in 1878 (41 Vict.
3), during the progress and not impossibly in
of a long drawn out scrutiny in a well known
l: see Lincoln (2), H. E. C. 500. The ques-
ect came before an Election Court in 1879 in the
orth Case, H. E. C. 531, and it was held that
uded inquiry into the legality of votes included
lists save those speeially excepted by sec. 3.

uth Perth Case (1899), 2 Ont. Elec. Case. 144,
stion arose, and it was decided in the same way,
n Wentworth Case does not appear to have been

ns of a contrary view appear in the South Perth
2 Ont. Elec. Cas. 30, and in the South Ontario
lection Case (1898), 18 C. L. T. Occ. N. 321.
e earlier decision does not seem to have been
nd the attention of the learned Judges was not
24 of the Voters' Lists Act. In neither was the
n the same pointed manner as in the other two
outh Ontario case is said to have been affirmed
ut the records shew that the appeal was by the
gainst so much of the order as allowed a new
e substituted, instead of taking the petition off
he Court, and the appeal was dismissed. The
n was not before the Court, and was not dis-

the decisions are concerned, it appears that when-
stion of the effect of sec. 24 was directly pre-
nsideration, the holding was in accordance with
view.

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It is said that this view takes away the force of s
and 9 of the Ontario Elections Act, by which the righ
person to vote is made to depend, amongst other things,
his being of the full age of 21 years and a subject o
Majesty by birth or naturalization. These are, no
necessary parts of the qualification to vote, just as the
being on the list is a necessary ingredient of the right to
But infancy and alienage are questions depending on evi
and what the Voters' Lists Act has settled is that they
be tried and determined before the voters' list is finally s
revised, and transmitted. By that Act, and by the Ma
Suffrage Registration Act as well, the same qualificatio
full age and British allegiance must exist in order to e
a person to be on the list of voters. It is when the lis
being settled and revised under these Acts that these m
of qualification are to be investigated and determined th
the medium of those persons whose duties or interests r
them to see to the preparation and final revision of a p
list of voters possessing all the qualifications that th
makes necessary.

It is to be noted that sec. 42 of the Manhood Su
Registration Act is to the same effect as sec. 24 o
Voters' Lists Act.

The rota Judges rightly concluded that it was not o
them to enter into an investigation of the votes of the
sons alleged to be aliens or under age.

The next ground of appeal has relation to a number o
sons whose votes were struck off and disallowed to the p
appellant.

While proceeding with the scrutiny in the month of
last, the cases of persons whose votes were alleged
invalid by reason of their having voted at polling su
sions other than the ones at which they were entitled to
without having a proper or valid certificate of transfer
entered upon. The evidence of the returning officer tal
the trial was referred to. It appeared from it that a
number of certificates of transfer had been signed in
and left to be filled up with the names of persons ap
for them. And Teetzel, J., by whom the scrutiny was
conducted, ruled, in accordance with the judgment o
Court, that the votes of the persons presenting such c
cates should be struck off. The now respondent was
ous of recalling the returning officer, but was unable t

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ndance. In the absence of other evidence, some struck off, and some others were left open evidence, the result being to place the now in a majority of 12 votes. At this stage an was made at the instance and request of the hen the matter was further proceeded with el and Anglin, JJ., in January last, the return- as present, and counsel for the now appellant ation to be allowed to recall and examine him ce to the votes dealt with in July. After some he Judges directed that the evidence of the re- er and others be taken, but no formal opening eady decided was directed. The evidence was taken, other testimony was adduced, and the lly ended, with the result already stated.

ended for the now appellant that the matter of was fully open upon the whole evidence, and made to appear that many of the votes struck owed should not have been so dealt with.

tion was resisted by the now respondent, but it sary to determine how the matter was finally the Judges, for a careful perusal and con- all the testimony leads to the conclusion that, with what has been already decided by this ow appellant cannot in any event succeed in re- najority found against him.

mony discloses such a want of regard for the ons of the Act, and such serious irregularities ng and issue of certificates of transfer during officer's stay at Fort Francis on the afternoon of the 18th and the night of the 19th January, ast grave doubt, if not suspicion, upon all the ssued on that occasion. The testimony of the icer, of Osborne, the election clerk, and Mc- s not agree as to the times when, the persons the manner in which the transfers were pre- nature by the returning officer. It appears that ist or lists of names of persons to whom certi- to be given, in the hands of Osborne. The hich he obtained it seems rather questionable. ointment as election clerk about a week before nomination, he communicated with the presi- aries, or other officers of the Liberal associa-

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tions in the riding, asking for lists of persons for who
tificates would be required. It was chiefly for persons
names appeared on the lists so obtained, and not for p
applying in person or by writing, that the transfer
made out. In many cases no appointment as agent
person for whom a certificate of transfer was made o
been made at that time. The certificate was given
assurance that the appointment would be made. Son
would say he would see Kennedy (the now appellan
get the appointment. The lists received by Osborn
discussed in the committee room at various times
view to seeing who would be suitable persons. The r
ing officer handed to Osborne a large number of blan
tificates, and the latter and others filled up some of
and they were signed by the returning officer. It is
all clear what was done before they were filled up and
nor is it shewn exactly how many were filled up and
after reference to the voters' lists, or how many were
in blank and filled up afterwards, but it is clear that
signing them the returning officer did not himself re
the voters' list in order to ascertain if the person
was entitled to vote, nor did he or the election cler
notice of the certificates to the deputy returning office
the polling subdivisions in which the persons named
by the voters' list entitled to vote. There was, the
nothing to prevent them from voting at both polling

On his examination at the trial, the returning offic
he signed 30 certificates in blank. On his second ex
tion he said there were only 17. Osborne said 17
certificates were left with him, of which he returned
Dr. Mackenzie said he obtained some blank certificat
not from Osborne. He was not able to say exactl
many; but not more than 3—he may have had mor
this was on the same occasion, it seems evident that
were more than 17 signed in blank and handed ou
Mackenzie was unable to say to whom he afterward
transfers to enable them to vote. One was given to
Milne, a commercial traveller who had previously
to Osborne that he expected to be at Fort Francis on
day, and would like to vote there, and the certifica
filled up and handed to him on polling day. It see
dent that others of the certificates were made use of i
lar fashion. One was given to a conductor of a
train, whose train was delayed until he had voted.

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e whole evidence it is impossible to say exactly
ere signed in blank and left to be filled up by
o whom they were handed. And, having regard
isfactory account given of the whole proceed-
eference to them, it cannot be said that the
wrong in declining to give effect to the evi-
inst the former testimony. By giving to them
f every doubt, it is perhaps possible to say that
e votes which were struck off should have been
ealt with, but, even as regards them, the evi-
so unmistakably clear as to render it incumbent
the Judges erred. In any case a different hold-
ot alter the result.

er rulings of the Judges were objected to, and
disposed of, viz.:—

Judges found that one H. O. Bell gave one
arkinson $10 with intent to influence his vote
the now respondent and with the expectation
d influence him, and they struck off and dis-
vote as against the now respondent. The now
ontends that they should have struck off
vote as well, and should also have struck off
as against the respondent.

ard to Parkinson's vote, he was not present and
nined as a witness. There is no evidence that
d that the $10 was paid to him in order to in-
vote. The circumstances, so far as disclosed,
the contrary. He came to the office of the
Lumber Co., where Bell was, in order to get a
m one Sloan (on account of a debt the latter
Sloan was absent, and Bell, who was a friend
ced Parkinson $10 and took his note therefor.
said to or by Parkinson to shew that he con-
election transaction. There was nothing to
o him the commission of a corrupt act, and the
ly refused to strike off his vote.

other vote, the question turns on whether Bell
of the now respondent so as to bring the case
76 of the Ontario Election Act. The Judges
was not shewn to be an agent, and, although
ot unreasonably have held the contrary, it can
stantial benefit to the appellant to reverse their

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(2) P. Whelan's vote, No. 21 in scrutiny particulars appellant contends that this vote should not have struck off as against him. Whelan was the conduct a train to whom reference has been already made. clear that he was given a certificate of transfer simp the purpose of enabling him to vote at Fort Francis his train was there, and his vote was properly struck

(3) John McKay's vote. It was charged that a r ticket had been given to him by one Campbell to him to come to Fort Francis to vote for the now respo McKay's evidence shewed that he had received some or ticket from one Bethune, who was not identified Campbell. Leave was given to amend and produce bell, who was said to be at Fort Francis, but the case w followed up, and the matter dropped. The vote was, fore, properly left undisturbed.

(4) The appellant's contention that the now respo should be declared not entitled to the seat under sec. the Ontario Elections Act, by reason of corrupt practi the part of agents, and some other objections, wer posed of adversely to the appellant during the argun

In the result the appeal should be dismissed with

GARROW and MACLAREN, JJ.A., concurred.

MEREDITH, J.A., and CLUTE, J., also concurred giving reasons in writing.

RIDDELL, J. FEBRUARY 27TH,

TRIAL.

KENDRICK v. BARKEY.

Contract—Conveyance of Land to Son upon Undertak Latter to Pay Money to Daughter—Enforcement b ter—Trust — Pleading—Amendment—Statute of —Instrument of Fraud—Perjury.

Action to recover $1,000 and to have declared a forced a lien on land therefor, in the circumstance tioned in the judgment.

James McCullough, Stouffville, and J. W. McCu for plaintiff.

W. E. Middleton, for defendant.

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LL, J.:—The late John Barkey was a farmer resid-
township of Whitchurch, in the county of York.
o sons, one of them the defendant, and one
he plaintiff. He was the owner of two farms but
ther property. His daughter, the plaintiff, had
ed in 1884, and upon her marriage had received
father a few articles by way of "setting-out"—
ne with her husband to live upon his farm. John
rms were respectively of about 33 acres and 100
tent, and he agreed with his son, the defendant,
rger of the two farms should be granted to him
rust and condition that the son should mortgage
and pay his sister the sum of $1,000 thereout.
action was carried out so far as the deed of the
concerned, but, the father dying shortly there-
defendant refused to pay the plaintiff the $1,000.
action being brought, he, as I think, commits
corrupt perjury to support his defence, and the
wholly founded in fraud.

intiff brings an action, and in her statement of
out that John Barkey, being the owner of the
greement was entered into by and between John
l the defendant whereby John Barkey agreed to
said lands to the defendant, in consideration of
ant paying $1,000 in cash to the plaintiff, which
nount the said John Barkey had intended to be
these lands to the plaintiff, who is his daughter;
a term of the said agreement that on the con-
the said lands being made by the said John
e defendant was to raise by way of mortgage on
nds a sufficient sum of money wherewith to pay
f the said sum of $1,000; that John Barkey did
lands, the defendant then agreeing with the said
ey that he would at once raise the necessary
way of mortgage as aforesaid on the said lands,
course of a few days would pay it to the plaintiff;
l mortgage the lands for $3,000, but refuses to
intiff the $1,000; that John Barkey informed the
the whole transaction and assigned the said sum
o her. She therefore claimed the sum of $1,000,
the lands, and an order for the sale of the lands,

endant pleads that he was the owner of the land
deed was made; that the deed was unconditional;

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and that he made no agreement with and had no
standing with his father as stated. The case was tr
me without a jury at Toronto, and I came to a clear
sion upon the facts, but have delayed giving judgm
allow the parties an opportunity of settling. There
to be now no hope of settlement; I therefore do not f
delay.

An administrator, a trust company, had been app
to the estate of John Barkey. This administrator h
fered to become a party plaintiff to the action upon re
proper indemnity against costs. This the plaintiff h
fused to give, and the case was tried with the sister
plaintiff and the brother as sole defendant.

At the trial, counsel for the plaintiff put the case
upon the proposition that John Barkey had made a co
with the defendant that the defendant should pay
plaintiff the sum of $1,000; and the claim was mad
thereby the plaintiff became entitled to enforce this
ment. All idea of any trust was expressly repudiate
counsel insisted that without any trust this contract
be recovered on at the instance of the plaintiff.

I think it is quite clear that such is not and has no
the law since 1861, when Tweddle v. Atkinson, 1 B
393, was decided.

It is true that even as late as 1871 and 1872 "
Judges have used language, sometimes very explicit,
effect that where a sum is payable by A. B. for the
of C. D., C. D. can claim under the contract as if
been made with himself." See, e.g., Touche v. Metro
Warehousing Co., L. R. 6 Ch. 671, per Lord Hat
L. C., at p. 677.

And it seems to have been thought that a person s
as C. D. is in the case stated, would have a right in
though not at law to enforce the contract made
benefit.

This supposed principle of equity received its deat
in England in the case of Re Empress Engineering
Ch. 125, and now the rule as laid down in Tweddle v.
son is undoubted.

Were the administrator made a party plaintiff, it
that the agreement could be enforced. Gregory v. W
3 Mer. 582, was long supposed to lay down the doct

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n the first two editions of Sir Frederick Pollock's
ent work on Principles of Contract.

work in the 2nd edition (1878), it is said: "On
and, the case of Gregory v. Williams shews that
rson for whose benefit a contract is made may
plaintiff with one of the actual contracting par-
the other, and insist on the arrangement being
carried out. The facts of that case so far as now
ay be stated as follows: Parker was indebted to
nd also to Gregory; Williams, being informed by
t the debt was about £900, and that there were
ebts, undertook to satisfy the debt to Gregory on
assignment of certain property of Parker's.
s not a party to this arrangement, nor was it com-
to him at the time. The property having been
o Williams accordingly, the Court held that
uing jointly with Parker, was entitled to call
ams to satisfy his debt to the extent of £900 (but
, although the debt was in fact greater) out of
ds of the property. It was not at all suggested
uld have sued alone in equity any more than at

he second edition; the third edition, 1881, and all
editions, add: "And the true view of the case
be that the transactions between Williams and
ounted to a declaration of trust of the property
the satisfaction of Gregory's claim to the speci-
" citing the Empress Engineering case.

regory case is interesting to Ontario lawyers
ause it was relied upon by Strong, V.-C. (after-
Henry Strong, C.J.), in Mulholland v. Merriam, 19
laying "down a reasonable and convenient doc-
ing directly to the present case, and shewing that
f had an equitable right to enforce the contract
thing more than a contract) which the defendant
o with John Mulholland. It is true that in the
gory v. Williams the quasi trustee, Parker, was a
, and it may be said that a personal representa-
settlor, John Mulholland, ought to be a party
there is no such representative in existence, and
constituted it would only be for the express pur-
s suit, since all the property of the intestate was
by this assignment to the defendant, and there

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are now no assets to administer or debts to pay; and suc an administrator would be a mere formal party as a trustee having not the slightest interest. I am therefore justifie in directing, as I do, under the Consolidated Order 56, tha the suit may proceed in the absence of any person represent ing the estate of John Mulholland." And the Vice-Chancel lor came to the conclusion that the suit was maintainabl first, because the defendant is a trustee under the instru ment, and the plaintiff is one of the cestuis que trustent "second, even though the defendant be not a trustee, and i liable in contract only, plaintiff has nevertheless an equit able right of suit on the authority of the case referred to. On rehearing the decree was confirmed; Spragge, C., simpl concurring; Strong, V.-C., not repeating the grounds of hi decision; and Blake, V.-C., placing his judgment upon th ground of a trust created by the instrument.

It is a curious circumstance that such jurists as Si Henry Strong and Sir Frederick Pollock, one on one side o the Atlantic and the other on the other, should come to suc different conclusions as to the necessity of adding the cove nantee or his representative as a party plaintiff. The prin ciple supposed by Strong, V.-C., to have been laid down i Gregory v. Williams has, however, been laid at rest; an now no doubt exists that in the case of a mere covenan or agreement of A. to B. that he, A., will pay C. a certai sum of money, C. cannot successfully sue A.: Faulkner v Faulkner, 23 O. R. 252; Edmison v. Couch, 26 A. R. 537 542. But it seems "an established rule of law that wher a contract is made with A. for the benefit of B., A. can su on the contract for the benefit of B., and recover all tha B. could have recovered if the contract had been made wit B. himself:" Lloyd v. Harper, 16 Ch. D. at p. 321; In re Flavell, Murray v. Flavell, 25 Ch. D. 89, 97. And West v Houghton, 4 C. P. D. 197, can no longer be considered a of authority. See, however, Coleman v. Hill, 10 O. R. a p. 178, per Boyd, C.

If this be so, it was unwise of plaintiff not to have added the trusts company as a party plaintiff. She has liberty now to add the company as such party plaintiff if so advised, upon procuring a consent in writing. This the company should give upon receiving a proper indemnity as to costs.

But I think that there is another way in which plaintiff is entitled to recover without the addition of any other

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effect of my finding of fact that the land was
John Barkey to defendant upon the trust and
at defendant should raise money upon it and
the sum of $1,000 to plaintiff is to make defen-
e of this land for plaintiff to the extent of
Mulholland v. Merriam and Edmison v. Couch.
nt asks to be allowed to plead the Statute of
. Middleton claims as a right to amend his
plaintiff be allowed to amend hers, and argues
e pleadings as they stand, and upon the express
of counsel at the trial of any claim by way of
uld be allowed as of right to amend the defence
the statute. As to the ground taken by coun-
iff, I do not think that plaintiff is to be injured
of her counsel upon the law. . . . Courts
de and are not sustained by the people for the
sel, but counsel exist for the assistance of the
termining the rights of the people. I do not,
old plaintiff to her election, if such it can be
I think that the facts are sufficiently set out
nent of claim to establish a trust in favour of
is not necessary that the word "trust" or any
be used, if facts be pleaded such as, if proved
will establish a trust. See Con. Rule 268; Metro-
. Co. v. Defries, 36 L. T. 150, 494; Hammer v.
. R. 346; Watson v. Hawkins, 24 W. R. 884.
le 278 is only permissive, and not mandatory.
e application to plead the Statute of Frauds,
ot think that it is of right, I cannot see that the
be held in less repute than that of the Bills of
. .

ce to Williams v. Leonard, 16 P. R. 544, 17 P.
inion Paving and Construction Co. v. City of
te 38; In re Coles and Ravenshear, [1907] 1

too, that a matter of mere hardship should not
uestion of granting or refusing an amendment.
egislatures exist whose duty and function it is
any litigant is and should be at liberty to avail
ny legislative enactment, whether by way of de-
ence—and it is for the Court only to declare
w is, and not in effect to repeal it by preventing
tting it up.

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The defence of the Statute of Frauds then may
up, but on the terms of defendant paying all the c
the action up to the time of the amendment. . .

[Wall v. McNab, per Idington, J., 19th October
not reported, referred to and followed on this poin

If these terms are not acceded to, I refuse the a
tion to amend, and plaintiff will then beyond quest
entitled to recover.

It remains to consider the result if the stat
pleaded.

Until within a few years it was doubtful what the
could do in a case of this kind. . . .

[Reference to Bartlett v. Pickersgill, 1 Eden 515
v. Smith, [1891] 1 Ch. 384; Trimble v. Hill, 5 Ap
342, 344.]

I must follow the decision of the English Court
peal, and the law as laid own by that Court in Ro
cauld v. Boustead, [1897] 1 Ch. 196, is that the Sta
Frauds will not be allowed to be made an instrum
fraud. In this case the trust is proved, the defen
endeavouring to commit a fraud, he is, as in Bar
Pickersgill, endeavouring to support his fraud by
perjury—the Court cannot allow the Statute of Fra
be made an instrument of fraud, and the defence acco
fails.

There will be judgment for plaintiff as asked w
costs of suit.

The registrar of the Court will call the attention
County Crown Attorney to my findings.

[Upon the question of the right to enforce a c
made by another, see also Mitchell v. City of Lond
surance Co., 15 A. R. 262; Re McMillan, 17 O. R. 34
v. Gibson, 21 O. R. 248; Henderson v. Killey, 14 O.
17 A. R. 456; Osborne v. Henderson, 18 S. C. R. 698
judgment of Patterson, J., 11 C. L. T. Occ. N. 88; Ro
v. Lonsdale, 21 O. R. 600.—Ed.]

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MASTER. FEBRUARY 28TH, 1907.

CHAMBERS.

STER v. CONSUMERS' GAS CO.

DDS v. CONSUMERS' GAS CO.

LLS v. CONSUMERS' GAS CO.

ARD v. CONSUMERS' GAS CO.

f Actions — Application of Common Defend-
l of Order—Actions to be Tried together.

defendants for an order consolidating these which plaintiffs respectively sought to recover juries caused by an explosion at the defend- 8th September last. The first action was December, and the others 8 days later. ffs had the same solicitors. The statements not identical, were not materially different. each case was simply this: "The defendants tions in the statement of claim." The actions ne.

r, for defendants.

erson, for plaintiffs.

ER:—In Williams v. Township of Raleigh, 14 ilar motion was refused by Ferguson, J. Mr. tly relied on Young v. Noyes, 16 P. R. 254, at it was a binding authority.

ation of that case makes it difficult to see how onciled with the decision in Smurthwaite v.] A. C. 494. But, however that may be, it is t what was done in Young v. Noyes was per- ut it was not consolidation in the ordinary e term. The learned Judge came to London sizes, which began on 1st October, as appears . . . He found these two cases on the list for notion, which had been referred to him by the

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local Judge. At that stage no other consolidation v
sible than that the actions should be tried together, a
in the exercise of his discretion as trial Judge, l
properly (if one may be allowed to say so) directe
done as in Martin v. Grand Trunk R. W. Co., noted

Since that time many motions of this kind hav
made in which such a course has been taken. I ma
to Baker v. Township of Whitchurch and Kelly v. To
of Whitchurch, in which a motion for consolidati
made in Chambers on 3rd October, 1905. There th
made was that the cases should be entered togeth
tried together unless otherwise ordered by the trial
This order was affirmed by Meredith, C.J., on appeal
and also afterwards by a Divisional Court.

The only order that can be made now is of tha
acter. What consolidation really means is shewn by
J., in Niagara Grape Co. v. Nellis, 13 P. R. 179, affi
the Court of Appeal, ib. 258. There Osler, J.A., thoug
actions by the same plaintiffs for similar causes of
not unreasonable. In the present case it is to be o
that it would be most unjust to stay three of the
while one was tried, for the reasons given in Hoc
Grand Trunk R. W. Co., 7 O. L. R. 186, 187, 3 O. W.
affirmed by a Divisional Court, 7 O. L. R. 658, 3 O.
663.

Mr. McPherson stated that two only of the case
ready for trial, as the nature and effect of the inju
the other two plaintiffs was not yet sufficiently de
to enable the cases to be properly laid before the Cou
only order I can properly make is that such of the c
are to be tried at the coming assizes be set down to
so that they can be tried together if this is thought
able by the trial Judge. This is a very usual course a
adopted in Martin v. Grand Trunk R. W. Co. (kn
think, as the St. George accident case), explained i
liams v. Township of Raleigh, supra, at p. 54.

The motion is therefore dismissed with costs in th
to the plaintiffs.

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J. FEBRUARY 28TH, 1907.

WEEKLY COURT.

FRAWLEY AND TOWN OF ORILLIA.

cense Act—Municipal By-law—Part Prohibition—
1 of Act—Power to Prohibit Sale in Shops, Leaving
s with Power to Sell—Discrimination—Costs.

by Frawley to quash a by-law of the town of Oril-
g that the sale of spirituous, fermented, or other
red liquors, except by wholesale, was prohibited
hop or other place in the town of Orillia other
se of entertainment.

Gunn, K.C., and J. Haverson, K.C., for applicant.
Thompson, Orillia, for town corporation.

L, J.:—The by-law was passed under the author-
141, sub-sec. 1, of the Liquor License Act, which
ollows: "The council of every township, city,
incorporated village, may pass by-laws for prohi-
sale by retail of spirituous, fermented, or other
red liquors, in any tavern, inn, or other house or
blic entertainment, and for prohibiting the sale
cept by wholesale, in shops and places other than
public entertainment. Provided that the by-law,
final passing thereof, has been duly approved of
tors of the municipality, in the manner provided
ions in that behalf of the Municipal Act."

law was attacked on two grounds: (1) that it is
ng in its effects; and (2) that the council can-
under sub-sec. 1 of sec. 141, above quoted, a
rohibit the sale of liquor in shops only.

econd objection is not well founded, and as a re-
ound that the section confers two co-ordinate
he council, one to prohibit the sale by retail in
inn, or other house of public entertainment, and
prohibit the sale except by wholesale in shops
ther than houses of public entertainment, then
ection would also fail, because, if there is power
-law either with reference to one class of prem-
other, or both, in the same by-law, then there
objection on the ground of discrimination.

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Mr. Haverson argued with great ingenuity that
regard to the history of the legislation and to its
purpose, namely, the entire prohibition of the re
of intoxicating liquors in local municipalities, the
ture never intended that the retail sale in shops sh
prohibited without also extending such prohibition
ers of taverns who, under their licenses, in add
special privileges, possess all the rights to sell by re
are conferred under shop licenses up to one quart, a
it could not have been the intention of the legislatur
fore, to incidentally improve the retail business of th
keeper by cutting off the business of the shopkeepe

He pointed out that in Orillia, which is a town
or 6,000 population, there was, when the by-law was
only one shop license, while there were 7 tavern
and therefore in this instance it could not be said
object of the Act was being satisfied by the by-law.

The point never seems to have been raised be
judicial consideration, although in Re Local Option
A. R. 572, while it was not necessary for the purpos
termining the questions submitted in that case, Mr.
Maclennan, at p. 594, discussing similar provisions o
mer Act, says: "Municipalities may prohibit sales
in public houses, and they may also prohibit such
shops and other places. The prohibition of retail sale
be confined to public houses, or it might be exte
shops and all other places throughout the municipal
kind of sale which was meant to be dealt with in the
part of the clause being the same kind which was d
in the first, namely, sale by retail."

I confess that upon the argument I was incline
view that the section contemplated one by-law only
classes of premises; but a careful reading since le
though not without hesitation, to the view that th
two distinct members to the section, and that it
petent for the council to pass one by-law for prohibi
sale of intoxicating liquors in taverns, inns, or othe
or places of public entertainment, and another by-
prohibiting the sale thereof except by wholesale in sh
places other than houses of public entertainment.

The use of the words "and for prohibiting" in
line of the section lends much force to the view

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.ws might be submitted, or one by-law limited
s of premises.

eading I was also impressed with the view that
he Act supported Mr. Haverson's argument.
enacts that "no tavern or shop license shall be
e effect within any municipality in which there
y by-law passed in pursuance of section 141,"
this can be read distributively, which on fur-
ation I think it can, it would be quite incon-
the view above indicated as to sec. 141. If,
view I have expressd as to sec. 141 is correct,
143 should be construed as meaning that no
should be issued in any municipality in which
ce a by-law under sec. 141 prohibiting the sale
g liquors, etc., in taverns, etc.; and that no
should be issued in such municipality where
y-law prohibiting the sale by retail in a shop,

gard to the action of this municipality in do-
strike one as being difficult to reconcile with
he legislation in question, by passing a by-law
only one shop, leaving untouched 7 taverns with
to do retail business, and to the fact that the
st raised on this motion for adjudication, I
ile dismissing the motion I should do so with-

FEBRUARY 28TH, 1907.

DIVISIONAL COURT.

RE PETRAKOS.

*inerals—Discovery of Minerals—Application—
by Mining Recorder—Appeal to Mining Com-
—Neglect to Serve Parties Adversely Interested
nts upon Same Property.*

Samuel Petrakos from decision of Mining
.

l was heard by FALCONBRIDGE, C.J., BRITTON,
J.

guson, for appellant.

uglas, K.C., for Coleman Development Co.

Carthy, for F. M. Burdock.

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RIDDELL, J.:—The appellant, Petrakos, alleges 28th May, 1906, he discovered valuable mineral upo property staked on 9th June, and filed his applicat June, 1906; the Coleman Development Co. allege ery on 13th June, 1906, staked on the 16th June, application 20th June.

The Mining Recorder decided against Petrakos's tion, and he, being minded to appeal to the Mini missioner, filed a notice of appeal under secs. 74 a the Mines Act, 1906, in the office of the Mining but omitted to serve the Coleman Development Co. dock (who claims by way of assignment from that c

The Mining Commissioner held that the appeal properly launched by reason of the failure to ser and Petrakos now appeals to the Divisional Court u provisions of sec. 30 of the Mines Act, 1906.

Before the Mining Commissioner there seem been two points urged by Petrakos: (1) that the necessity for serving notice of appeal upon parties interested within 15 days; and (2) that the Coleman ment Co. and Burdock are not "parties adverse ested." The first was not urged before us, as i could not well be in view of the express words o and of the cases Christopher v. Croil, 16 Q. B. D. 6 v. St. Thomas, 18 P. R. 454.

But it was argued that persons who have filed cation upon the same property as the applicant "parties adversely interested;" and that althou admitted that, if the application of the appellant s allowed, that of the other parties filing applicati necessarily be disallowed, while if the application o pellant be disallowed, the application of one or these will probably be allowed. I am unable to co parties more vitally interested than persons in the of filing applications, only one of which can be allo counsel before us was not able to give instances of a to whom the description "party adversely intereste be applied against whom the same arguments woul available as against the parties here.

I think the Commissioner was entirely right. the appeal should be dismissed with costs.

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, J., gave reasons in writing for the same con-

IDGE, C.J., also concurred.

FEBRUARY 28TH, 1907.

DIVISIONAL COURT.

ATIONAL TEXT-BOOK CO. v. BROWN.

l Law—Powers of Provincial Legislature—Act g Licensing of Extra-provincial Corporations— es—Company Carrying on Business in Ontario.

y plaintiffs from judgment of FALCONBRIDGE, . R. 835.

re, for plaintiffs.

ckburn, London, for defendant.

rtwright, K.C., and T. Mulvey, K.C., for the neral for Ontario.

RT (MULOCK, C.J., ANGLIN, J., MAGEE, J.), dis- peal with costs.

, MASTER. MARCH 1ST, 1907.

CHAMBERS.

v. GUELPH AND GODERICH R. W. CO.

of Actions — Application for, by Common De- Opposition by Plaintiffs — Diverse Interests — ctions together—Application to Trial Judge.

y defendants for an order consolidating this er actions brought against the same defendants.

enison, for defendants.

lfoot, K.C., and W. H. Blake, K.C., for the iffs.

TER:—This and three other actions are brought ame defendants for false arrest and malicious Two of the actions are brought by the same

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solicitor; a third by a different solicitor. These thre
laid their venue at Goderich. The fourth action is
other solicitor, and the venue is laid at Stratford. T
all at issue.

The defendants are moving to have "these actio
solidated and proceeded with as one action, and th
plaintiffs may be ordered to pay to the defendant
costs of this application to be taxed," assuming, as it
seem, that the separate actions are an abuse of the
of the Court. . . .

It is unnecessary to repeat what I have said in th
of Webster v. Consumers' Gas Co., ante 363. I woul
point out that this is a much more impossible motio
that in Webster's case. Here there is nothing in co
except that the plaintiffs were all arrested on the sa
and for their alleged separate trespasses on the san
perty. As pointed out, consolidation is an inexact a
very appropriate word when what is asked for is, a
to have four cases which are at issue "proceeded
one action."

Conceding, for the sake of argument, that if the
tiffs all had the same solicitors, some such order co
made by virtue of the inherent jurisdiction of the
how can it be done here? Are all the plaintiffs to be
over to one solicitor? If so, to which? And how i
be decided who is to be the choice of the Court.

Is the plaintiff whose venue is at Stratford to be b
against his will to Goderich? Or are the others to
to Stratford?

If all the four actions were combined, would the se
solicitors be allowed for attending at the trial, and
the plaintiffs be represented by at least 4 and p
8 or 12 counsel? Who would have the conduct of th
and decide what evidence ought to be given? Wou
defendants' witnesses have to submit to 4 cross-ex
tions?

I am not aware of any power to do what is aske
one can be made a plaintiff in an action without his
consent. And there does not seem to be any powe
to the Master in Chambers to direct 4 separate pl
to combine for the purposes of the trial. It must be
ent on a little reflection that until the cases are actu

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of the trial Judge nothing can be done without injustice. Otherwise, if 1 of the 4 plaintiffs e prevented from being at the trial or was unable re the attendance of a witness necessary for his e whole 4 actions would have to be postponed, might go on indefinitely. Or one of the plaintiffs might die, and delay would be inevitable to allow ecessary revivor. See Lake Superior Power Co. v. 2 O. W. R. 506. No doubt, many other possible and bable difficulties might be suggested. The fore- e perhaps sufficient to shew that, even if there was do what is asked for, it could only be exercised and with the greatest caution. But, as it is, I ee that there is any such power to make the order r; and the motion must be dismissed with costs to in any event. If the 3 actions, in which the laid at Goderich are all set down for trial at the on 19th March, the defendants can make applica- he trial Judge for such arrangement (if any) as he sider proper and just. The dismissal of the present s not to prejudice them on any such application.

., J. MARCH 1ST, 1907.

CHAMBERS.

BUDD v. DIXON.

arty Procedure—Indemnity or Relief over—Contract mages—Distinct Issues—Setting aside Third Party e.

al by third party from order of local Judge at North nissing a motion by third party to set aside a third tice served by defendants.

. Kerr, for the appellant.

Macintosh, for defendants.

Strathy, for plaintiff.

ZEL, J.:—Plaintiff by the statement of claim al- agreement of sale by defendants to plaintiff of 300 stock in the Cobalt Town Site Mining Company share, and default by defendants in carrying out ment, and claims delivery of the shares or in the e $5,100 damages.

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In the statement of defence defendants deny th
tract and set up the Statute of Frauds, and also alle
no proper tender was made by plaintiff; and further
plaintiff suffered any damage it was owing to his ow
gence.

In the notice served upon the third party, def
claim indemnity against the plaintiff's claim, on the
that on 20th October, 1906, the third party had ag
deliver to defendants 300 shares of stock in said co
but had neglected and refused to deliver said shares
fendants, whereby defendants were prevented from
ing the same to plaintiff.

In the affidavits filed by defendants, an agreem
the third party to sell the 300 shares at $5 per shar
leged, but this agreement is disputed by the third p

The only item in common in the two alleged cont
that each was in respect of 300 shares in the same
company. Both contracts are in dispute, and neith
be established, and it is not suggested that the evid
establish the one will be pertinent to the other. E
damages for breach will not be the same, the alleg
chase price in the one being $6 per share, and in th
$5 per share.

I can see nothing in the material which would
a claim by defendants to contribution, indemnity,
other relief over against the third party. Defendan
be liable to plaintiff, and still not be entitled to
anything from the third party, or they may succ
against plaintiff, and also be entitled to enforce the
contract with the third party.

To adopt the language of my brother Mabee in
and Western Trust Co. v. Luscombe, 13 O. L. R. at
O. W. R. at p. 408, "the issues are entirely separa
distinct, and present different considerations, and t
dence will be different."

In the same judgment, 13 O. L. R. at p. 37, 8 O
at p. 408, it is further stated that "one object of th
(third party) is to prevent the same question arising
the plaintiff and the defendant and the latter and th
party being tried in different forums, and the
scandal of different conclusions being arrived at."

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these reasons, I think this is not a case for the ap-
of the third party provisions, and the appeal will
ed with costs of the third party, and the plaintiff
id by the defendants, the former forthwith, and the
any event.

, J. MARCH 1ST, 1907.

WEEKLY COURT.

DOUGLAS v. BENSLEY.

*— Sale of Land—Purchase Money—Account—Con-
tion of Contract — Acquiescence — Latent Ambigu-
— Extrinsic Evidence — Conflicting Testimony —
ing of Referee—Appeal—Interest—Unsettled Account
dgment on Report—Costs.*

al by defendant from report of the senior Judge of
nty Court of Northumberland and Durham, to
s special referee, this action was referred.

. Porter, Belleville, for defendant, appellant.

S. Huycke, K.C., for plaintiff, respondent.

TON, J.:—. . . The chief thing in dispute is as to
er construction of a written agreement between the
dated 8th October, 1901, in regard to the sale by
t to plaintiff of defendant's property.

first question that presents itself for consideration
er or not this agreement contained, when concluded
the parties, the words now apparently crossed out,
ords do not appear on the paper furnished by de-
to plaintiff some days after its date as a copy of the
eement. The true agreement is the one without
rds, and as set out in the statement of claim.
must be held to have acquiesced in the agreement,
ed by the copy furnished to him, and to which he
until after the commencement of this action object.
not only did not object, but adopted and based his
on the writing as contended for by defendant.
at this writing, it will in reference to the facts

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"admit equally two different applications." There is
fore, a latent ambiguity, and for the explanation of
to find the intention of the parties, the extrinsic e
must be considered. The learned special referee n
did consider all the facts and circumstances, and he
plaintiff and defendant and heard the evidence g
each. If the evidence of the parties is accepted
given, each party mistook the intention of the other.
tiff says, in substance, that he was to pay $15,000,
more or less, for the property. He was to pay off
incumbrances and certain liabilities of defendant.
in the aggregate amounted to more than $15,000, de
was to pay plaintiff the excess, and if they amounted
than $15,000, plaintiff was to pay the difference to
ant. Defendant's contention is that $15,000 was me
only as the round amount, and that what plaintiff re
to pay were the incumbrances and liabilities ment
called $15,000—but, if more, plaintiff would have no
and if less, defendant would have none. After the
ment of 8th October, 1901, defendant executed a
ance; plaintiff went into possession, and proceeded
own way to pay and deal with the liabilities. The
must now be dealt with as an executed contrac
learned referee has accepted plaintiff's version as
defendant, and has construed the writing according t
tiff's contention. It is in favour of plaintiff's view
to a large part of the liabilities, plaintiff was, bef
agreement, liable as surety for defendant, and if,
any purchase of the property, plaintiff had paid th
fendant would have been liable to plaintiff for the
amount so paid.

It is, no doubt, an argument in favour of defenda
words which would have made the matter clear a
ranted the construction contended for by plainti
struck out before execution. Then on the other sid
are the facts (1) that defendant was anxious to pay
all—that plaintiff should not lose by defendant; (2)
fendant's price was only $15,000; and (3) defendant
expressing a willingness to pay some additional inte

Plaintiff in his evidence stated that defendant
would, after plaintiff paid off the liabilities and got
perty, owe plaintiff a lot more, or words to that effe
referee accepted this evidence. There does not appea

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ve been any expectation that the liabilities would
mised or reduced; there was no speculation on
; no exact reckoning made or attempted at the
fore the agreement was made. Each party knew
al way what was to be paid, and there was this
amount on the one side, with $15,000 on the other,
difference to be adjusted later. Upon the whole
think the ruling of the referee upon the agree-
right and should be upheld.

ems making up the amount found in favour of
hould stand, except that of interest on the bal-
37.15 from 8th October, 1901, to date of report,

great respect, I am compelled to differ from the
to this.

ff by the terms of his agreement was to pay off
ties at once after 8th October. He got posses-
ly after, but did not in fact pay some of the lia-
til a considerable time later.

he paid, he did not for some time render any
to defendant, or make any demand for payment,
not claim—or say he would claim—any interest
tatement of claim was served.

atement of claim shews an entirely unsettled ac-
any items as allowed are very different from those
. In some instances plaintiff in the proof and
established more than he claimed. This is im-
shewing the position of the parties as to the
right to recover interest. Defendant could hardly
d, in the way the matter was left in plaintiff's
attempt to ascertain the correct amount and ten-
demand of any precise amount was ever made.

port should be varied by deducting the $167.21.
leave the total amount due to plaintiff . . .

was no cross-appeal.

ff has succeeded as to the larger part of the
volved, but, as defendant has succeeded in part,
ts should not be awarded against him.

ff's counsel asked for judgment upon the report.
's counsel did not object to this in so far as plain-
d, so there will be no necessity for sending the

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matter back to the referee, but the report as altered wil confirmed, and judgment will be entered for plaintiff his claim for $637.15 with costs, and with three-fourth the costs of opposing present appeal—such last mentic costs to include plaintiff's motion for judgment. Judgm for defendant on defendant's counterclaim to stand a report. Report in all respects to stand, except as n tioned above.

MARCH 1ST, 1

DIVISIONAL COURT.

REX v. HODGINS.

Justice of the Peace—Jurisdiction—Delay in Issue of S mons—Liquor License Act—Criminal Code—Prohibitio Certiorari.

Appeal by defendant from order of ANGLIN, J., ante

W. E. Middleton, for defendant.

J. R. Cartwright, K.C., for the Crown and the conv ing magistrates.

THE COURT (MULOCK, C.J., MAGEE, J., CLUTE, J.), firmed the order refusing prohibition, but ordered tha writ of certiorari should issue to remove the conviction proceedings into the High Court.

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THE

ARIO WEEKLY REPORTER

(To and Including March 9th, 1907).

TORONTO, MARCH 14, 1907. No. 9

LOCAL MASTER AT OTTAWA. MARCH 1ST, 1907.

CHAMBERS.

LL v. AMERICAN HENDERSON ROLLER BEARING CO.

ry Judgment—Rule 603—Defence—Counterclaim—ve to Proceed—Terms—Damages—Execution—ts.

ion by plaintiff for summary judgment under Rule

. Orde, Ottawa, for plaintiff.

J. Kidd, Ottawa, and J. O. Carss, Ottawa, for de-s.

LOCAL MASTER:—The plaintiff was employed to subscriptions for stock in the defendant company, ims $1,440 balance due for commissions on the sales by him, together with interest thereon from the hen the amount fell due. He obtained subscriptions shares of $100 each, or a total of $28,800. The sion agreed on was 10 per cent., one-half to be paid 30 days after the receipt of the application, and the "within 12 months, or pro rata as soon as the re-calls on subscriptions are made, whichever event rst happen." Twenty per cent. of the amount sub-was to accompany each application. The first half commission, amounting to $1,440, was duly paid; and ths from the date of the obtaining of the last sub-n expired on 2nd October, 1906.

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In answer to the application an affidavit of J. B
derson, the secretary of the company, has been file
he has been cross-examined on it at very great leng
is apparent from these that there is no defence
claim. Certain counterclaims are, however, sought
set up. The plaintiff was himself the holder of 10
of the stock, and has not paid a call of 20 per cent
on 8th August, 1906, the liability to pay being dis
The defendants seek to counterclaim for this $200, a
conceded that they are entitled to do so. They also
the remaining $600 unpaid on the stock. As this has
been called in, it is not due, and cannot form the s
of a valid counterclaim. Finally it is alleged that pl
"wrongfully and with intent to do the defendant co
injury, interfered with and induced the subscribe
said stock, and amongst them those whom he had pr
to subscribe for said stock, to refuse and decline to p
amount called for in respect of the shares so subscrib
by them, and the defendant company has suffered gre
and damage by reason of the wrongful acts and interf
of the plaintiff in respect of the matters above ment
and the defendant company claims damages against th
plaintiff for his said wrongful acts and claims the ri
set off the said damages against the plaintiff's claim,
herein." It was to this paragraph of the affidavit th
long cross-examination chiefly related. It appears fr
latter and from the affidavits in reply that in April,
the subscribers for stock in Ottawa and Montreal,
those whose subscriptions had been obtained by the
tiff, became dissatisfied with the way in which the aff
the company were being conducted, and employed
their number, a solicitor, Mr. J. F. Orde, to protest o
behalf to the directors. Mr. Orde did so, urging th
terms of the prospectus were not being carried ou
taking the ground that this entitled them to have the
scriptions cancelled. The list of those dissatisfied, s
by him to the company, included the name of the p
On 3rd May, 1906, shortly after learning of this, M
derson wrote the plaintiff: "I understand that you
tively interested in a movement to secure the cancella
the stock for which you have obtained subscriptions.
somewhat surprised to learn this, as your interes
be seriously affected by such a condition. You ca
understand that, if the company are supposed to ma

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ıs in this respect, it will be up to you to return the
ns that have been paid on account of this stock,
n readily see that half the amount called paid is
n account of commissions." Nevertheless, Mr.
ı, in a letter of 3rd July, in answer to a letter of
reatening suit, makes no mention of this matter,
an elaborate explanation of why it is not conven-
ne company to pay, says: "We shall endeavour to
ıve a cheque on commission account before 12th
s 10th;" and again in a letter of 1st August, in
one of 22nd July, again threatening legal action,
e have been waiting the result of this test (de-
the letter) before offering our stock in the U. S.
: to place a large block this week, and in about
ill give you a substantial payment on commission
In the meantime negotiations and correspond-
being carried on between Mr. Orde and the com-
without anything being accomplished, the former
whom he represented maintaining always the
d, and the company putting them off from time to
arious pretexts. When the call was made on 8th
he dissatisfied shareholders declined to pay it.
tion would seem to have been deemed a strong one
mpany, for the board of directors eventually de-
to endeavour to force the collection, and nothing
the present time been done on either side to end
e. On 25th September, when the company well
position taken by the dissatisfied shareholders
d to the call on the stock, Mr. Henderson wrote
iff: "We herewith enclose receipt for your 20 per
on 10 shares of stock held by you in the American
ı Roller Bearing Company. We also enclose re-
ou to sign, acknowledging transfer of the amount
om commission account. We are pleased to state
ers in connection with the American Company are
very favourably, and that we will in the course of
ne be in a position to pay you in full the balance
mmission. Trusting that you will co-operate with
development of this grand enterprise, which prom-
ch to us in the near future," etc. To this com-
ı the plaintiff made no reply. It is quite clear
Henderson's cross-examination that the defend-
not a scintilla of evidence of the alleged wrongful
the part of the plaintiff, beyond the mere fact

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that he was one of those for whom Mr. Orde was
and this fact was known to Mr. Henderson as early
May. Moreover, in an affidavit filed in reply the p
specifically denies that he ever interfered with or i
any of the subscribers for stock to decline to pay calls
counterclaim sought to be set up is, therefore, seen
most shadowy, and it is not one with which, in my o
the defendants should be allowed to delay the pl
Moreover, in view of the letters of 3rd July, 1st Augu
25th September, and notwithstanding that of 3rd
cannot think that the defendants are serious in rais
or have in doing so any object other than delay. A
careful perusal of the depositions and corresponde
have been unable to come to any other conclusion.

There will, therefore, be judgment for plaintiff f
amount claimed, with costs, execution to be however l
to $1,240. The defendants are, nevertheless, to be e
to proceed to trial with all branches of their counter
and execution is not to issue for the balance of the
tiff's judgment until these issues have been disposed o
a term of an enlargement, the defendants' counsel
took to accept any notice of trial the plaintiff might g

MACMAHON, J. MARCH 4TH,

TRIAL.

PITT v. DICKSON.

*Fraud and Misrepresentation — Action for Deceit — S
Shares—Untrue Representations—Principal and A
Contract—Settlement—Reservation of Rights—Dam*

Action for deceit.

G. F. Henderson, Ottawa, and A. W. Greene, Ottaw
plaintiff.

F. H. Chrysler, K.C., and N. G. Larmonth, Ottaw
defendant.

MACMAHON, J.:—The plaintiff and defendant were
members of the syndicate that purchased from the co

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f the Temiskaming Railway the mining rights of a
f the right of way of the railway in the Colbalt dis-
company was incorporated under the name of "The
Way Mining Company Limited," and the mining
nder the agreement with the railway were trans-
y the syndicate to the company. The plaintiff
d and paid for 16,666 shares of the company's
ich were allotted to him.

the organization of the company, an agreement
red into among certain of the shareholders, who
ed their stock to the defendant and two others
es, for the purpose of pooling said shares, and by
ement it was provided that in certain events the
should sell certain of the shares so transferred for
price obtainable, dividing the proceeds ratably
e shareholders.

head office of the company was and is at Ottawa,
e defendant resides, and in the statement of claim
ed that in consequence of his intimate acquaintance
affairs of the company, and as such trustee and
, it was arranged between the defendant and plain-
resides in Montreal—that the plaintiff should rely
defendant's advice and counsel in connection there-

laintiff was leaving for England on 12th September,
to be absent for a few weeks, and on the 13th the
t wrote him regarding the mining company, saying:
are to send me authority, I will act for you." The
on the 14th, wrote defendant: "I am enclosing
Mr. Beament (the president of the company and
he trustees under the 'pooling' agreement) for
t for me in the Right of Way Mining Company,
no doubt my interests will be well looked after."
ame day plaintiff wrote Mr. Beament as follows:
pect to leave for England to-night, and will prob-
bsent for a month or so, this letter will be your
to allow Mr. J. P. Dickson to look after my in-
the Right of Way Mining Company. I under-
t the stock allotted for the lease is to be pooled
od of 6 months, which is agreeable to me."

laintiff returned from England on 12th October,
e 15th defendant wrote him saying: "The Right
ine looks to be good, and I am satisfied your invest-

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ment will net you a handsome profit in due time.
keep you posted from time to time if anything arise
terest to the shareholders. . . . I enclose you pro
(of the company) shewing what you are in."

On 31st October defendant wrote plaintiff: "I
copies of two telegrams from Cobalt, which speak for
selves. One is from Seybold to Fraser, and the othe
W. R. Bradbury to his brother. Right of Way stoc
to be O.K."

The telegram to A. W. Fraser is dated 30th Octob
reads: "Over one ton number one ore taken out o
to-day plenty of native silver. E. Seybold."

That to Bradbury Bros. is dated 31st October, and
"Right of Way vein 8 inches. Very rich. One ton
day."

Mr. Seybold has long been a resident of Ottawa, a
Fraser is a barrister in Ottawa, and both are direc
the company; and Bradbury Bros. are brokers in Ott

Between 2 and 3 o'clock on Monday 5th Novemb
defendant telephoned the plaintiff at Montreal askin
to come to Ottawa that evening, which he did, the d
ant meeting him at the train. The defendant told the
tiff he had brought him up to discuss Right of Wa
matters, and mentioned that he (defendant) had
shares and that he had a chance to get out around
par ($1 per share) and that there were 4 of them
insurance company (John Emo, the general manager
Canadian Accident Insurance Company, A. J. Barr,
vice-president, the defendant, secretary-treasurer, all
head office in Ottawa, and the plaintiff, in the M
agency) who were interested in the Right of Way min
he advised that all should go out together, that he co
90 cents for his shares, but if he could get a block of
or 60,000 shares he would send to Mr. Eastwood, a br
Toronto, who would sell if he got $1 a share for ther

I also find that the defendant represented that M
had consented to sell his stock (Emo's stock was then
ing in defendant's name) and that he would see Ba
was then absent from town) in a few days. The de
stated that, being a trustee of the pooled stock, he kne
was going on in the inside circle, and that the pool
be broken, and that one of the directors of the co
who was a lawyer, had offered to sell 10,000 shares at

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llar, and if the pool was broken and 400,000 shares
wn on the market, their (plaintiff's and defend-
ck would probably go at 40 or 50 cents. The
hen reminded him of the telegrams from Seybold
bury and his own letters of a few days before. The
replied that Seybold was not to be believed, and
he (Seybold) and Fraser had been mixed up in
ining deals, although when in the box defendant
t he had made a personal inspection of the Right
nd had the reports and was satisfied, and that even
old stated in his telegram he knew before.

laintiff states that on the strength of the represen-
made to him, he said to the defendant, "If you
your own stock at $1, you can sell mine too." The
then drew up the following agreement, which the
igned:—

wa, Nov. 5th, 1906. In consideration of the sum
, to be paid $3,000 on or before November 9th,
balance on equal instalments of $4,000 each, at 30,
0 days thereafter, I hereby agree to dispose of
ares of my holdings in the Right of Way Mining
Limited, said shares to be delivered on the break-
existing pool or release thereof by the members
l." . . .

back of this was indorsed on 13th November the
—

eby (sic) and transfer this agreement to Mr. J. A.
of Ottawa, together with all my interest therein.
son."

previous day—Sunday 4th November—Mr. Bea-
president of the company, had an interview with
dant in which he told the latter if he could get
he pooled shares he would take them at 75 cents,
defendant replied he thought Pitt would sell at
Beament then said, if he (defendant) could get
shares held by Pitt at $1 a share, he would take
is impossible to comprehend why the defendant
itt would sell at 75 cents, as on 12th October he
ntiff, "I am satisfied your investment will net you
e profit in due time," and only 5 days previously
itten the plaintiff enclosing the Seybold and Brad-
rams, and saying, "Right of Way stock looks to be
efendant had neither seen plaintiff nor had any

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communication with him in the interval, and the st
made to Beament is therefore unaccountable unless
contemplated doing something which would cause
to lose faith in the mine.

About 10 o'clock on the night of Monday 5th
ber defendant telephoned Beament that he had pu
Pitt's 15,000 shares at $1.

The defendant and Beament both say that the
was to act as agent in the purchase of the plaintiff'
and defendant was to get 50 per cent. of the profit
sale.

The plaintiff was returning by an early train
morning of Tuesday the 6th, but before leaving Ott
wrote defendant the following letter and dropped it
letter box of defendant's office: "Nov. 6, '06. M
John: I met Herb Chambers here last night, wh
nephew of Egan's, and he has the mining fever be
was telling me of his holdings and said he bought 20
of Way and shortly afterwards was offered $1.50 pe
He was advising me very strongly to buy some if I co
it at $1, but said it had gone up to $1.50 with no of
He does not know I am interested, so could have no
in telling me this. Now this has made me feel kind
easy, but still I hardly think you would trim me by
my holdings for $1 if they are on the market at
However, as I said last night, I want same price as y
your holdings at, and will allow you something f
trouble. Yours, &c., E. Pitt."

That night the plaintiff telephoned the defenda
asked if he had received the letter; the defendant
had, but the plaintiff need not take any stock in tha
defendant also stated that the deal had gone throu
he was sending plaintiff a draft for $3,000. This
the defendant said he received from Mr. Beament.
fendant wrote on the 6th saying: "In accordance w
agreement entered into last night, I enclose herewit
in your favour for $3,000, being for first payment on
of the 15,000 shares of the Right of Way Mining C
which you have sold to me for other parties."

With that letter, defendant enclosed an assignm
favour of himself of the 15,000 shares, and a letter ad
to Seybold, Dickson (the defendant), and Beame
trustees of the pooling agreement, releasing the 3,000

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ne defendant had remitted the draft, requesting
to execute the assignment and sign the letter.
f wrote saying he did not understand the assign-
ould be in Ottawa on the following Saturday,
be the 10th November.

ndant knew that if he told plaintiff he was buy-
k for Beament, the president of the company,
e, it would be fatal to his scheme, so he repre-
e defendant that he was willing to sell out his
t that price. But when Beament was in quest
he did not offer to sell his stock to him. And
st from a statement he made to R. G. Stewart
not the slightest intention of selling his own
ppeared highly elated at his success in inducing
art with his stock, for on 6th or 7th November
art that he thought well of the mine and had
hares of a weak man in the pool. He destroys
's faith in the stock by depreciating the mine,
oclaims the plaintiff a fool for believing him.

statement that a director of the company, who
r, had offered 10,000 shares of the stock at 50
dollar was untrue. There were only two lawyers
torate—Mr. Beament and Mr. Fraser—and de-
w that Beament was not a seller but a purchaser
and Fraser said he had not offered any stock for
qually untrue that there was a movement on foot
pool, which the defendant averred—with the cer-
, he said, his position as trustee of the pooling
nabled him to speak—existed. Both Seybold and
ecome members of the syndicate that purchased
ghts from the Temiskaming Railway Commis-
he defendant's solicitation; and it is incompre-
t a few months thereafter he should cast the
e did by representing that both were dishonest
e of them could not be believed. Both were
nesses, and stigmatized as absolutely foundation-
ements made by defendant to plaintiff. There
not the slightest foundation for the allegations
t them or either of them. It was not true that
authorized the defendant to sell his stock at $1,
Emo was the general manager of the insurance
h which both plaintiff and defendant were con-
had induced the plaintiff to take stock in the
y Company, this statement of the defendant was

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also designed to shake the faith of the plaintiff in t
and in the future of the stock he held.

The stock was not listed on the Montreal Exch
the plaintiff was not aware of what it was being qu
until Friday morning 9th November, when Mr. Er
was in Toronto, telegraphed it was selling at $1
plaintiff then concluded that he had been deceived in
ing with his stock, and determined on not execut
assignment defendant had sent him.

On 9th November plaintiff received a telegram f
fendant requesting him to come to Ottawa, and plaint
up that night, going on his arrival to defendant's
The defendant said he had sent for him to settle his
tiff's) case. Mr. Beament came there after plaint
rival. The defendant stated he had got himsel
pretty bad box through the plaintiff and McNeill, a
when he bought the plaintiff's stock he was acting
faith and did not know it was going to jump up as
He likewise stated that Mr. Beament was going to
to see the person who held the McNeill stock, and en
to effect a settlement. The plaintiff told Beamer
he was in Toronto to see the people who held his st
wire him. Beament said there was a possibility
agreement being broken on account of defendant
trustee of the pool. Beament then asked the plaint
concession he would be prepared to make. Even t
defendant did not mention that Beament was the o
the shares, although when giving his evidence he s
"the party" spoken of as being in Toronto and w
holding the stock was Beament himself. The latter
fore, did not require to go to Toronto to communica
"the party" who was holding the stock and who wo
the plaintiff to make concession if he could succeed i
ing the contract.

In order to understand the reference to the McNe
it is necessary to state shortly the defendant's dealin
him. Edward R. McNeill was holder of a large nu
shares of the stock, and the defendant on 7th N
had induced McNeill, by the like representations
plaintiff, to transfer his stock to him (defendant), a
Neill had brought an action to set aside the transact
had threatened his (defendant's) arrest on a
charge. The defendant on the 12th or 13th Noven
turned the stock to McNeill.

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nent went to Toronto on the night of the 9th, on the 10th telegraphed the plaintiff as fol-
thout prejudice will amend contract as follows
es at par, 3,000 to be released now and 4,000
of par within 30 days."

ntiff replied the same day: "Cannot accept offer.
3,000 consideration cash already paid in full
without prejudice, offer good to-day only."

answered on the 10th at 7 p.m. as follows:
gram received: will accept offer therein con-
order on trustees in my favour."

2th Beament telegraphed: "Unless order for
red to-morrow will take proceedings; answer;"
intiff replied same day: "George F. Henderson
e; see him."

2th plaintiff wrote Mr. Henderson as follows:
ion with papers which T. A. Beament may pre-
to sign, please see that any civil or criminal
that Dickson may have incurred is not waived
ink you had better hold papers and advise me,
up on Wednesday."

he afternoon of the 13th, while negotiating for
, Mr. Henderson expressed the hope that the
o Beament by plaintiff, in his telegram of 10th
o release the 3,000 shares paid for, would be
to plaintiff without reserving any right of ac-
against defendant.

ening of the 13th the plaintiff came to Ottawa,
g was held at the Russell House, at which plain-
Henniker, his Montreal counsel, Mr. Henderson,
ament, were present. Mr. Beament produced
hich then had on it the indorsement signed by
t, already referred to, transferring his interests
eament, who, in answer to a question by Mr.
ated that the indorsement had been made two
usly. Beament said he was acting for himself,
l an assignment dated 13th November (exhibit
ecites that the plaintiff is the owner of 16,666
es of the company's stock which had been as-
e trustees under the pooling agreement, and
o sell 3,000 of the shares to Beament. By the
rt of the agreement the plaintiff, in consider-

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ation of $3,000 already paid, sells and assigns to B
3,000 of such shares.

Under the transfer made by the defendant to B
by indorsement on the back of the agreement (exhil
the word "cancelled" was written and signed by B
and the plaintiff. This left the plaintiff 12,000
shares assigned by him to the defendant under the
ment of 5th November (exhibit 10).

When the assignment was produced, the plain
sisted upon his rights against the defendant being re
and the matter was discussed by Henniker, Hen
and the plaintiff, and counsel advised him that unc
agreement his rights against the defendant were n
Mr. Beament said the only time he heard of any rese
of rights was during the day when the settlement wa
discussed, and he understood Mr. Henderson to say
had advised the plaintiff as to the reservation, and
ered it should not be insisted upon. He (Beament)
did not hear what transpired while the agreement wa
discussed at the Russell House. As all the partie
within 3 or 4 feet of each other, it is surprising he
hear what plaintiff was insisting on.

I find that the plaintiff, before signing the agreem
the sale of the 3,000 shares, insisted on the reserva
his rights against the defendant for the fraud he a
him of committing, and was assured by counsel that
cuting the agreement he was not foregoing any cl
might have.

The plaintiff was induced to part with his stock t
the fraud of the defendant in making statements wh
knew to be untrue regarding the property he was in
him to sell. And Lord Campbell, in Walters v. Mor
D. F. & J. at pp. 723-4, said: "Simple reticence do
amount to legal fraud, however it may be viewed by
ists. But a single word or even a nod or a wink or a sl
the head or a smile from the purchaser, intended to
the vendor to believe the existence of a non-existin
which might influence the price of the subject to be
a fraud at law. So, a fortiori, would a contrivance
part of the purchaser better informed than the ven
the real value of the subject to be sold, to hurry the
into an agreement without giving him the opportu

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formed of the real value, or time to deliberate, ce respecting the conditions of the bargain."

k v. English Stock Bank, L. R. 2 Ex. at p. 265, id: "With respect to the question whether a nswerable for the act of his agent in the course 's business and for his master's benefit, no sen- on can be drawn between the case of fraud and ny other wrong. The general rule is that the werable for every such wrong of the servant or ommitted in the course of the service and for benefit, though no express command or privity be proved."

approved of in McKay v. Commercial Bank of ck, L. R. 5 P. C. 394; Citizens Life Assurance , [1904] A. C. 423. See also the judgment of n Ruben v. Great Fingal Consolidated, [1906] 46.

ipal may be liable jointly and severally with the judgment against the principal though unsatis- o an action against the agent in respect of the Brinsmead v. Harrison, L. R. 7 C. P. 547; er and Servant, 8th ed., p. 358.

e trial, I thought there was a novation of the th November, caused by the assignment there- nt to Beament; but that view, I think, was not e contract, although entered into by Pitt, was behalf as principal, and he could have sued h. There was, it is true, after the settlement plaintiff and Beament, a cancellation of the the word "cancelled" being written below the the back of the agreement which was signed nd Beament; but that did not cause a relin- his claim against the defendant for the tort that contract. There was no satisfaction for the plaintiff insisted on the reservation of his ceed against the defendant therefor, if such ere necessary.

arks, a broker, said that on 6th November free the pool) sold at $1.50, and on the 7th at $2. e had an offer of $1.50 for pool stock; on the was from $3.25 to $4, and on the 20th it was

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J. G. Turriff, who became a stockholder when t
pany was organized, purchased from defendant on
vember 3,334 shares of the pooled stock at $3; of th
ber 1,667 belonged to Mr. Emo.

I think a fair basis on which to assess the damag
highest price of the stock on 13th November (w
settlement between plaintiff and Beament took pla
$4 a share. As plaintiff has been paid $1 a share,
on the 3,000 shares, the judgment will be for $9,0
costs.

MOSS, C.J.O. MARCH 4T

C.A.-CHAMBERS.

COPELAND-CHATTERSON CO. v. BUSINESS TEMS LIMITED.

Appeal to Court of Appeal—Stay of Execution of In —Disobedience of Injunction — Contempt of Cou Granted upon Terms.

Motion by defendants for an order under Rule
staying the execution of the injunction awarded aga
fendants under paragraph 24 of the judgment at th
8 O. W. R. 888, pending an appeal to the Court of
from the judgment; and motion by plaintiffs to s
prosecution of defendants' motion because of an alleg
tempt of Court on their part in disobeying the inj

W. H. Irving, for defendants.

W. E. Raney, for plaintiffs.

MOSS, C.J.O.:—Defendants have not as yet b
judged guilty of contempt for disobedience of the
tion, and this is not the proper forum for now dete
that question. Besides, even if it were admitted t
fendants have been proven to be in contempt, they
thereby absolutely debarred from taking any step. T
that parties to an action guilty of a contempt can
step is subject to several exceptions. One of these
the party is entitled to prosecute an appeal from th

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awarding the injunction or containing the
is alleged he has been guilty of disobeying.

are prosecuting an appeal, and as incidental
sk a stay of the injunction until their appeal
d and disposed of. Rule 827 (d) recognizes
is relief in a proper case, and proceedings to
scarcely be regarded as on the same footing
ation for an indulgence: Ferguson v. County
R. 399; Centaur Cycle Co. v. Hill, 5 O. L. R.
377, 401. But, however this may be, I think
sent instance defendants ought to be allowed
n their motion; and I also think that it should

s involved are substantial and important, both
questions at issue and the consequences to
the final result. The effect of the injunction
ching as regards defendants' business, and it
stice to plaintiffs to give to defendants a fair
prosecuting their appeal without subjecting
present to the serious—almost irreparable—
o their business that a compliance with the
ns to involve. Defendants are, as I think, ap-
d faith.

at execution of the injunction be stayed pend-
tion of the appeal, upon defendants giving an
hat they will keep an accurate account of all
ansactions in respect of binders, holders, and
ified in paragraph 24 of the judgment, made
o by them, shewing the persons to and with
es or transactions were made or had, and will
uch account, verified by affidavit made by their
with the registrar of the Court, every two
e appeal has been heard and disposed of.

s must also expedite the hearing of the appeal
litating in every reasonable way) and bring it
g at the next sitting of the Court.

of the applications may be costs in the appeal.

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CARTWRIGHT, MASTER. MARCH 5TH,

CHAMBERS.

DIXON v. GARBUTT.

Particulars—Counterclaim—Alternative Claim—Postpo —Premature Motion.

Motion by plaintiff for particulars of defendant's co claim.

J. C. McEwen (W. Laidlaw), for plaintiff.

W. E. Middleton, for defendant.

THE MASTER:—The action is by an administrator cover deposit receipts for over $20,000, which defe alleges were given to her by the deceased by way donatio mortis causa. By the statement of defenc counterclaim defendant asks to have this claim establi and failing that, in the alternative, claims on a qua meruit for work and labour performed for the deceas her request from July, 1903, to May, 1906.

On her examination defendant is asked what she t herself entitled to for this. Her reply is that she c say, as she had not thought about it yet.

By the reply the claim of defendant to rank o estate for a reasonable allowance for such services mitted, and it is alleged that before action defendan asked to deliver such a claim, but refused. In the state of claim plaintiff submits to a reference to fix the p amount of such admitted services, so far as they m proved. It is not to prejudice defendant that no such was put in before action, as it might be thought that compromise her claim under the donatio mortis causa leged in her statement of defence.

After the cause was at issue and after the defen examination, this motion was made by plaintiff for ver and detailed particulars of the claim on the quantum m

The really important issue is whether there was a gift to defendant. If she succeeds in that, then her for services has been satisfied, and will not be carried ther.

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her hand, if she fails, then it is conceded that er for her services to deceased, and the amount ained on a reference in all probability, and is ly to be gone into at the trial. It would seem re for either side to go prepared on that point. Judge decides in plaintiff's favour, it is not some agreement may be arrived at. If not, l direct the reference asked for by plaintiff, and s main branch would not improbably be taken l the subsidiary claim would lie dormant in the

re seems that the motion is premature and is h costs in the cause.

, MASTER. MARCH 5TH, 1907.

CHAMBERS.

X EX REL. ARMOUR v. PEDDIE.

lections—Declaration of Result of Poll—Place g—Municipal Act, sec, 178—Failure to Comply egularity—Curative Provision of Statute, sec.

set aside the election of the reeve and council ip of Onondaga.

kenzie, for the relator.

wster, K.C., for the respondents.

TER:—The material facts are not in dispute, ollows. The township of Onondaga owns a situate in the village of Onondaga. There ll, called McKelvey's hall, at the village of This is in a building owned by the township used for many public purposes. The town- or many years past have used this at times for s and other similar purposes, and paid the use.

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By sec. 119 of the Municipal Act (3 Edw. VII the council has power to hold the nomination eith hall of the municipality or at any other place th fix by by-law. In exercise of this power a by-law wa of which a copy is in evidence. This provided nomination should take place at McKelvey's hall poll for one of the two subdivisions of the townsh be taken there also.

By sec. 178 of the Act it is provided that afte of the ballot papers, &c., the clerk "shall, at the t or if there is no town hall, at some other public noon on the day following . . . publicly decla elected . . . the candidates having the highest of votes."

In this case the declaration was made at the pro but at McKelvey's and not at the township hall, as by sec. 178, and it is contended that this section is tive; that there never has been any valid declarat therefore that there has been no valid election.

It was answered by Mr. Brewster that the e "town hall" was to be construed strictly, and ha plication to the case of a township. If, however, the only answer to the motion, I think it would force. I agree with Mr. Mackenzie that "town h general expression and includes any hall owned, or rented, by any municipal body and used for the pu poses of the corporation.

The real and substantial question is that raise Mackenzie. He contended that sec. 178 was comp mandatory, and supported his argument with som bility by pointing out the difference between this 119 in this respect. With his usual industry and he has cited many authorities enforcing the neces literal compliance with all statutory provisions as and place of election proceedings. Of these it may cient to mention Ex p. Robinson, 16 N. B. R. 389; rel. Conliss v. North, 72 N. Y. 124; People ex rel. Crissey, 91 N. Y. 617; and in our own Courts th cases of Re Kerr and Town of Thornbury, 8 O. W following Re Bell and Township of Elma, 13 O.

As to the first three it is to be observed that the considered in those cases would seem to have had

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. 204 of the Municipal Act. And these cases
een more in point if the nomination had been
lvey's hall without the necessary by-law having
or if sec. 119 had been identical on this point
.

two decisions went on the ground that non-
ith secs. 341 and 342 could not be cured by sec.
n each case an essential part of the by-law had
, and therefore, as pointed out by Anglin, J.
no provision was made for holding such an
ould come within the principle of the leading
ward v. Sarsons, L. R. 10 C. P. 733.

ne effect is the judgment of Osler, J.A., in Re
Township of Wainfleet, 28 O. R. 464, at pp.
where the learned Judge seems disposed to
vide effect to sec. 204 (or as it then was sec.
bservations of Meredith, C.J., in Rex ex rel.
h, 5 O. L. R. at p. 272, 2 O. W. R. 129, point
lirection. To meet this section it was strenu-
that because there had been no valid declara-
d been no completed election and that there-
could not apply.

ever, seems an untenable position. The elec-
word is generally understood, had taken place
lete. The township clerk had, no doubt, to de-
ult of that election, but that was all.

e formal declaration is necessary to make a
, then the election of mayor, controllers, alder-
rd of education, of the city of Toronto, would
city clerk were by an unexpected delay of a
nable to get here before noon of the day after
or if a few minutes before that hour he were
ome paralysed or insane, or for any other rea-
ncapable of making the statutory declaration,
do so. If the failure to make the declaration
hall" would render an election abortive, much
the omission to make any declaration at all.
se suggested it would be impossible to have the
in time to comply with sec. 178, either by man-
new appointment. For in the latter case by
the new appointment be made, assuming even
would apply?

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What would happen if the town hall caught
hour or two before noon, so that it was then a glowi
nace or a mass of red hot coals?

Or suppose that, following a common example, th
were all "to go on strike" on the morning of the ap
day. The only remedy would seem to be to conv
legislature to pass an Act to validate the elections t
expectedly rendered incomplete and nugatory. Man
similar difficulties might be suggested if it was wort
to do so. But the foregoing are perhaps sufficient t
that what took place in the present case was not suc
fect as necessarily voids the election. It is at most
gularity within the meaning of sec. 204, and certai
not be assumed to have affected the result of the e
There is no suggestion of anything of the sort hav
sulted from the declaration having been made at McK
instead of at the township hall. The result must
have become known to the electors, and any one int
could have taken all necessary steps and made all ne
inquiries long before the expiration of the 6 weeks.

Unless sec. 204 can be applied here, it would be
practical use. No doubt it was an irregularity to h
declaration at any other place than the "town hall."
have said before, those holding municipal offices an
ing themselves in these elections must be presumed t
the statutory requirements as to these matters; a
their plain duty to see that these are carefully and
complied with.

While, therefore, the motion is dismissed, it will b
out costs, as the language of sec. 178 is plain and
unambiguous, and should be obeyed unless and un
legislature sees fit to give the same power to cha
place of making the declaration that is given by s
as to holding the meeting for nomination. More at
will be paid to the statutory provisions if it is fou
irregularities, even if curable under sec. 204, may
expense to those who are affected by or responsible fo

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MARCH 5TH, 1907.

TRIAL.

LEY v. TOWNSHIP OF GAINSBORO.

xes—Controversy as to Amount Due—Excessive Distress—Special Damage—Costs.

recover damages for an illegal and excessive axes.

rman, K.C., for plaintiff.

llier, K.C., for defendants.

:—The defendants contended that the plain- r the year 1905 were $32; the plaintiff insisted uld only be $29.75. The disputed amount in- ax and statute labour. The plaintiff tendered was refused, and on 9th January, 1906, the ed a pair of valuable horses, said to be worth hstanding that there were chattels consisting , grain, and the like, on the premises. The deprived of the use of his team for upwards of en the collector abandoned the seizure and ment of the $29.75. This, however, was done sanction of the defendants, and only, as the , to save further trouble. Mr. Collier con- the amount disputed was still properly due to and the abandonment should not be taken as that the seizure was improper or illegal.

le to say, although the matter is not free from e defendants had not the right to distrain for I am of opinion that the seizure was clearly o excuse whatever was given for seizing the the plaintiff was using, and preventing him s use, when the collector could have seized ead of cattle, or other chattels, which would the plaintiff no unnecessary loss or inconven- hattels seized were worth more than 10 times f taxes claimed. Black v. Coleman, 29 C. P. ity for recovery for excessive distress although nages are proved; but in the present case the

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plaintiff proved substantial loss by reason of this e
seizure. There was no inventory or appraisement m

I think the plaintiff should recover $75 damag
costs on the County Court scale, without set-off to
fendants.

MARCH 5TI

DIVISIONAL COURT.

GODERICH ENGINE AND BICYCLE CO. v. ME

*Contract—Refitting Steam Yacht—Work and Labo
terials Supplied—Action for Price—Specific
Authority of Agent—Quantum Meruit—Incompl
—Defective Work — Deductions — Counterclaim
ages for Delay—Penalty—Interest—Costs.*

Appeal by defendant from judgment of BRIT
ante 1, in favour of plaintiffs for the recovery of $
and costs in an action for the price of an engine an
and for work and labour done and materials furni
the fitting up of defendant's steam yacht "Oriana."

W. N. Tilley, for defendant.

W. Proudfoot, K.C., for plaintiffs.

THE COURT (MEREDITH, C.J., ANGLIN, J., MA
agreed with the judgment of Britton, J., except a
position of the boiler in the boat, as to which th
directed that further evidence should be taken
Mabee, J., at the court house, Toronto, on 25th
unless the parties should agree to accept the repo
expert and agree upon some person as an expert. I
allowed to enforce their judgment for the amount f
Britton, J., and costs up to judgment, less $800,
to be paid into Court to abide the result of the in
to the position of the boiler.

Costs of the appeal and of the inquiry and furth
tions reserved.

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T, MASTER. MARCH 6TH, 1907.

CHAMBERS.

ERINGTON v. BANK OF HAMILTON.

n Ended by Conduct of Defendants—Question ction has Succeeded — Incidence of Costs — Mo- Summary Disposition.

y plaintiffs for order staying action with costs defendants.

Smith, for plaintiffs.

Osler, for defendants.

TER:—This action was brought to set aside a for 50 shares of stock and the assignment of tion to defendants the Bank of Hamilton.

are found in the report given in 8 O. W. R. he order there mentioned was made, the action against the bank. They filed their statement 7th November, alleging that on the previous re-assigned to the company. The defendants' examined on 1st February, and a few days s moved for an order to stay the action with by defendants, under Knickerbocker v. Ratz,

ndants were willing that the action should be t without costs. It appears that the assign- nsferred by the bank to the liquidator of the elected to take over the bank's securities.

s, therefore, similar to that of Hunter v. Town 18 P. R. 127, where the whole question is dis- Chancellor and Ferguson, J.; see especially p. t is impossible to say whether the action has not, and, unless the parties can agree as to isposition of this motion, it must be dismissed the cause.

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CARTWRIGHT, MASTER. MARCH 6

CHAMBERS.

NIXON v. MUNDETT.

Jury Notice—Notice of Trial—Close of Pleadings—claim—Joinder of Issue—Rules of Court—C

Motion by defendant to set aside jury notice a of trial as filed and served too late.

H. E. Rose, for defendant.

C. D. Scott, for plaintiff.

THE MASTER:—On 19th October last defenda ered their statement of defence and counterclaim. ther pleadings were delivered until 11th Februa plaintiff delivered a joinder of issue and served th attacked. It was argued that Rule 262 was to be itself, and that under it the cause was at issue than the middle of November.

In answer to this, Rule 263 was relied on, a said that unless the defendants (plaintiffs by coun noted the pleadings as closed, it was still open to side to join issue.

This certainly seems the more reasonable view. effect to both Rules in cases like the present. It the support of the regulations which prevent the of the pleadings until they are closed either by the part of the defendant or by the countercla put in issue, as was done here.

It is really little more than a question of co even if I thought the motion was technically e prevail, it would be proper to use the powers give 353, and, following the decision in Qua v. Canadian the Woodmen of the World, 5 O. L. R. 51, 2 O. validate these notices now as of the date of se that case the costs would, no doubt, have to be to ing defendant in any event.

As it is, I am satisfied that the notices were time, as the counterclaim was not at issue until th thereon by plaintiff in the original action. I do no

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ıce, 16 P. R. 330, decides otherwise, and Irwin P. R. 349, which was on this same point, seems ›ly that, had there been nothing more than a ıe on the counterclaim, the Master's decision een upheld. Holding that the pleadings were til 11th February, it follows that I am bound motion with costs to plaintiff in any event.

J. MARCH 7TH, 1907.

TRIAL.

CAMPBELL v. CLUFF.

'all of Wall of Building Left Standing after ngerous Condition — Notice and Knowledge — -Liability of Municipal Corporation—By-laws r of Buildings—Liability over of Owners of -Indemnity—Municipal Act.

ainst W. H. Cluff, F. H. Cluff, and the cor- e city of Ottawa, to recover damages for per- sustained by plaintiff by reason of the fall of city, due to the negligence of defendants, as

lerson, Ottawa, and A. W. Greene, Ottawa, for

lleton and W. Greene, Ottawa, for defendants

›p, Ottawa, and T. McVeity, Ottawa, for de- city corporation.

N, J.:—The defendants the Cluffs were, on ›er, 1906, the owners of the Gilmour Hotel, building, four storeys (49 feet) high, situated vest corner of Bank and Gilmour streets in the a. The hotel fronted to the east on Bank s built up to the street line, so that the win- nices were overhanging the street.

ght of Friday 14th September the hotel was ire, leaving the front wall on Bank street and

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the walls on Gilmour street to the south and the
the west at the rear of the hotel standing.

The plaintiff, who is a building contractor, was
morning of 9th October a passenger in a car of the
Street Railway Company, then passing south on Ban
and, when opposite the ruins of the Gilmour H
wall then standing on Bank street fell and crushe
car and severely injured his vertebra and ligame
rounding it, from the effects of which he had no
time of the trial fully recovered. There was also a
sive scalp wound, extending from the crown of t
downwards across the forehead, laying bare the s
its entire length, leaving a wide scar over the foreh

The corporation had many years ago passed a
(No. 1079), the sections of which necessary to be co
are:—

"93. Whenever any building in the said city is
son of age, fire, accident, or from any other cause, i
of falling . . . and endangers the surrounding
or the lives of the citizens, it shall be the duty of
inspector of buildings to notify the owner . . .
the same at once in a safe condition to guard agains
dangerous accident, and if such owner . . . for
after the receipt of such notice, neglects to com
such notice, he shall be subject to the penalties
by-law," etc.

"95. The inspector of buildings, besides prosecu
owner, . . . for each and every offence under t
last preceding sections, before or after any one or m
victions, may take down and remove, at the expens
owner, every building or erection or any part there
may be put up or may be contrary to the provision
by-law, or which may have become unsafe or dang
aforesaid from any cause whatsoever, but, except
of emergency, the inspector of buildings shall give 2
notice to the owner, agent, or person in charge o
session, but, if the owner or agent cannot be fou
notice may be given by posting up such notice on t
ing or section intended to be removed or taken do

Abraham Pratt was appointed building inspecto
council. On the morning after the fire, S. J. Dav
alderman, who had a lengthened experience as a bu
contractor, went to the scene of the fire—to see

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sts were protected—where he met Mr. Pratt, the
ıd the defendant W. H. Cluff, to whom he ex-
opinion that the walls were in a dangerous con-
hould be taken down. Cluff replied that they
eavy extension ladder against the east wall and
h it over, but could not. Davis suggested that
ıtime the wall should be braced or shored up,
have been done in 2 or 3 days; but that was
ed. He thought the walls were in a bad con-
e fire had been a very fierce one and the bond
ich are put every 4 or 5 feet along the wall to
apping to) had been burned to a considerable
therefore weakened the wall. There was also
k at the window in the front at the corner of
ilmour streets extending from the top of the
the top of the cornice . . . which greatly
strength of the wall at that corner.

r, the city engineer, considered the walls to be
ous condition, and, under instructions from the
on Monday 17th and Tuesday 18th, and with
e of the fire brigade, took down the walls on
eet, which is to the south, and the rear wall of
the west. He advised the taking down of the
ourth storeys of the Bank street wall, as he
top storey would fall with a high wind. . . .
rned Judge then stated the effect of the evid-
ral witnesses, and proceeded:—]

no question on the evidence that the Bank
which caused the injury to the plaintiff, was
nd was likely to be blown down by a high wind
d up, and the Cluffs were not only told this by
thers, but recognized it themselves, for W. H.
Provost on Monday the 17th that he intended
to shore up that wall. Between Tuesday the
ıturday the 21st W. H. Cluff said to Pratt, in
esence, that the fourth storey would have to
And on the 22nd he was notified by Pratt to
he third and fourth storeys of that wall. From
orning 15th September, after the hotel had
ed, until the 9th October, when plaintiff was in-
ys had elapsed, and, although the Bank street
ave been shored up in 3 or 4 days, and so have
comparatively safe, no effort whatever was made
secure.

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There was, I consider, gross negligence on the
the defendants the Cluffs in leaving the wall in tha
tion after such repeated warnings.

The wind on the morning of 9th October was ve
but, according to the evidence of some of the w
these high winds are not infrequent. If the city i
had acted promptly according to the terms of the
and taken down the third and fourth storeys of tl
street wall when the Gilmour street wall was take
or if the defendants the Cluffs had been vigilant,
their duty, and shored up or taken down the two top
of that wall, plaintiff would not have been injure

It was held, as early as 1704, in Regina v. Watts
357, that an indictment was good against a tenant
for not repairing a house standing upon the highwa
was ruinous and like to fall down, which the de
occupied, for as occupier he was answerable to the
for the house was a nuisance as it stood, and the
ing the house in that condition is a continuing nui

Where the walls of a church edifice belonging t
gious corporation were negligently permitted to sta
the rest of the building had been destroyed by fir
part of the wall afterwards fell upon a person while
along the street, it was held that the corporation we
to respond in damages for the injury: Church of
cension v. Buckhart, 4 Hall (Sup. Ct. N.Y.) 193;
Mullen v. St. John, 57 N. Y. 567, it was held that th
of a building adjoining a street or highway is under
obligation to take reasonable care that it is kept in
condition, so that it shall not fall into the street or
and injure persons lawfully there. "From the ha
of such an accident, in the absence of explanatory
stances, negligence will be presumed, and the bu
upon the owner of shewing the use of ordinary care.

By sec. 606 of the Municipal Act, R. S. O. 1897
"every public road, street . . . shall be kept i
by the corporation, and in default to so keep in re
corporation shall be responsible for all damage susta
reason of such default," etc.

And by sec. 609 (1), in case an action is brought
the municipality to recover damages by reason of
struction, excavation, or opening, or to recover
sustained by reason of any negligent act or omissio

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than a servant or agent of the municipal cor-
corporation shall have a remedy over against
r and may enforce payment accordingly of the
costs, if any, which the plaintiff in the ac-
over against the municipal corporation.

unicipal corporation shall be entitled to such
in the same action, if the person is made a
action, and if it is established in the action
e person that the damages were sustained by
n obstruction, excavation, etc., as aforesaid,
, left, or maintained by the person, and the
ge upon the trial of the action may order costs
or to any of the parties thereto.

party notice was given by the defendants the
f Ottawa to the defendants the Cluffs, claim-
y in respect of the claim of the plaintiff, on
hat their neglect to remove the wall which fell
e of the plaintiff's injury.

86 of the Municipal Act provides that the coun-
by-laws "for preventing and abating public
And secs. 93 and 95 of by-law No. 1079 were
wering the inspector, acting on behalf of the
to abate a nuisance, by authorizing him to
erection which has become unsafe and danger-
rrounding property or the lives of the citizens.

n v. Broadway Foundry Co., 87 Mo. 321, it was
henever it is discovered by the officers of a city
ure exists on the side of its street in so unsafe
s to endanger the safety of persons using the
omes the duty of the city either to remove or
d the city cannot relieve itself of this duty by
providing that the mayor shall require the
building to have the same secured or removed
e fixed in the ordinance, and on his failure to
e city shall perform the duty."

iley v. City of Kansas, 87 Mo. 103, it was held
e duty of a city to keep its streets in a reason-
dition for persons travelling thereon, and this
tends to an unsafe wall standing by the side
after notice of such fact." See also Parker v.
a. 725.

ely on its being recognized by the inspector
k street wall was a menace to the public using

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the street, and therefore a nuisance, it was the du
inspector, when the owners of the property did no
with his demand to take down the third and fourt
of the Bank street wall, to act under the authorit
by-law and carry out the work himself.

I must hold both the defendants, the corporati
city of Ottawa and the Cluffs, liable for the in
tained by the plaintiff, and I assess the damages at $

I direct that judgment be entered for the plain
30 days against the defendants the corporation of
of Ottawa for $800 with costs; and that said corpo
have judgment entered in their favour at or after
of the entry of such judgment against them by t
tiff, to recover over, from the defendants W. H. C
F. H. Cluff, the amount of the judgment and co
entered for the plaintiff against the defendants th
ation of the city of Ottawa, together with their o
of defending this action.

MABEE, J. MARCH 81

WEEKLY COURT.

RE CLEARY AND TOWNSHIP OF NEPE

Municipal Corporations — Local Option By-law — Quash — Adoption by Electors — Three-fifths Ma Computation—Rejected or Uncounted Ballots Considered—Illegal Votes—Going behind Voters Effect on By-law.

Motion to quash a local option by-law of the tow Nepean.

Gordon Henderson, Ottawa, and D. H. McLean, for applicant.

W. Greene, Ottawa, for respondents.

MABEE, J.:—The electors of the township of N 7th January voted upon a local option by-law, result, as appears in the certificate of the townsh dated 9th January, that 995 votes were polled, the

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by-law, 391 against, and 17 rejected ballots. A had before the County Court Judge, and his f 25th January gives 589 for the by-law, 392 rejected or uncounted ballots 20; thus giving a majority of 197. Three-fifths of the ballots ld be 588 3-5, so the by-law, having 589 in its ived "the approval of at least three-fifths of voting thereon" (6 Edw. VII. ch. 47, sec. 24, unless the 20 uncounted ballots are to be taken ration in computing the number "of the elec- hereon" mentioned in the section. The by-law passed by the council on 4th February.

ground of attack argued by Mr. Henderson was not received the approval of three-fifths of voting upon it, and so should not have been d by the council.

sons are advanced for this contention, the first the 20 uncounted ballots should be considered, ond, that certain persons voted who clearly had do so.

to the 20 rejected ballots. It was stated upon nt that some of these ballots were blank, and marks that compelled their rejection, but I do his is material, as I am of the opinion that the uncounted ballots cannot be considered in as- he number of electors voting on the by-law. I those whose ballots count for or against can be as voting. Some may have tried to vote, but eir attempt. These, I think, cannot be regarded as votes "upon such by-law." I agree with the Morgan, Co.C.J., in Re Weston Local Option 250.

as to the illegal votes. The material shews that aration of the voters' lists a large number of men appear thereon as voters, and the affidavit derson shews that upon his inspection of the pon the scrutiny before the County Court Judge at 5 of these ladies voted, and that he has rea- ve that a more careful examination would shew also voted, or 9 in all; the names are mentioned avit, and the different polling divisions where are given. These statements are not denied by ents, and the township clerk makes an affidavit

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in which he states that he prepared the lists w
utmost care, and, if there were mistakes, they are
accident, and that he acted in the utmost good f
accept these statements, but the fact remains t
accident, in so far as the lists were concerned, 5
and probably 9 voted who had no right to vote;
question for consideration is, what effect, if any,
upon the by-law?

Mr. Greene contended that the voters' lists we
and that the Court could not enter upon consider
the question as to whether persons voted who had
to vote.

In Re Leahy and Village of Lakefield, 8 O. W.
it is said: "Five tenants voted who had no right
because they had not been resident within the mun
for one month before polling day. That is not
verted, and, no doubt, these 5 tenants improperly
and if a sufficient number of such tenants to have
the result had voted, although it is impossible to te
way they voted, it would have been necessary to s
the by-law; however if all the 5 votes are struck
would result only to reduce the majority to 36."

In Re Young and Township of Binbrook, 31 O.
the Court went behind the voters' lists and took in
sideration some 80 persons entitled to vote, and
names had been left off the lists by the clerk up
assumption that they were not entitled to vote.

In Re Dillon and Village of Cardinal, 10 O. L.
5 O. W. R. 653, 750, affidavits were received as to
votes cast and the same was done in In re Salter and
ship of Beckwith, 4 O. L. R. 51, 1 O. W. R. 266.

In the Dillon case Mr. Justice Magee says: "A m
obtained by illegal votes does not present itself as no
an illegality such as the statute contemplates as a
for quashing." If this be right, the voters' lists
final, and the Court must consider the legality of th
that are questioned. See also Re Gerow and Town
Pickering, 12 O. L. R. 545, 8 O. W. R. 356, 497,
Sinclair and Town of Owen Sound, 12 O. L. R. 488,
R. 239, 298, 460, 974.

Of course, it was not argued that these ladi
the right to vote. I am bound by the foregoing

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luded, I think, from holding that it is not applicant to quash a by-law to shew that were cast.

under the saving clause of the Act the by- be quashed unless the illegality or irregu- d the result.

esult in this case affected by reason of these ts having been received and counted? It is the Court to say it was not affected. If these be deducted from the 589 who voted in favour , then three-fifths of the electors voting have of the by-law. In Re Leahy and Village of illegal votes were deducted from the votes the by-law; the same course was taken in Re ownship of Pickering, as well as in Re Sinclair Owen Sound, the last two cases being decisions Courts. Upon the strength of these authori- alternative but to say that there were 5 illegal ich must be deducted from the 589 favourable , thus defeating it because it has not received of three-fifths of the electors voting.

nust go quashing the by-law with costs.

MARCH 8TH, 1907.

WEEKLY COURT.

OTTAWA CEMENT BLOCK CO.

MACOUN'S CASE.

Winding-up — Secretary-Treasurer —Claim for nd Expenses—Contributory—Shares—Payment —Authority—Preference.

Macoun from report of local Master at Ottawa for which are reported ante 305), placing the on the list of contributories of the company wing upon stock subscribed, and refusing him

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the right to set off against such unpaid subscriptio
alleged to be due to him by the company.

N. G. Guthrie, Ottawa, for appellant.

Harold Fisher, Ottawa, for the liquidator.

MABEE, J.:—The proceedings are under the
Winding-up Act, and the winding-up order was
31st March, 1906.

The appellant had subscribed for 11 shares of
and at the date of subscription paid $275, and on
ber, 1905, the balance of $275 had been called u
directors of the company, and was payable on 10th
so that from that date the appellant was a debt
company, and the latter had a right of action ag
for the recovery of the $275.

The appellant was the secretary-treasurer of
pany, and on 31st December, 1905, in the compa
book entered to his credit for services rendered th
$275, thereby shewing his stock as having been p
full, and the Master has found that at that date
pany owed the appellant for moneys he had pro
bursed for the company the sum of $271, but ca
conclusion that the appellant had no authority to
entry as a payment by him, that the company
insolvent, and that the making of the winding-up
prived the appellant of his right of set-off.

The evidence shews that the appellant had pa
his own pocket certain moneys that as secretary-tre
would presumably have paid out of the company
had there been such on hand from time to time; he
to one of the company's clerks upwards of $150
his stenographer did work for the company, and
tioned the salary between himself and the comp
head office of the company was in the office of the
and he apportioned the rent between himself and
pany; these items and a few smaller sums of sim
acter made up the $271.06 which had been disburs
end of the year. Had the appellant made these
from time to time out of the funds of the comp
would have been properly made, and I think, as
treasurer, would have been within his authority
The course taken by him of paying them himself, a

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n the cash book by crediting himself against
g by him, I see no objection whatever to. The
October by the directors required payment to
as secretary-treasurer; suppose he had paid the
company in one sum, his liability would have
l; instead of doing so, he paid at various times
ums upon account of the company $271.06,
nt thereof, and making a charge against the
e end of the year. I think this was a good pay-
It need not be regarded necessarily as a set-
upheld as a payment by the appellant to the
71.06 upon the $275 call.

redited himself on the company's books from
s he made these payments, the $275 owing for
would clearly have been reduced from time to
rious sums so paid, and credited, and I do not
ct is in any way different by reason of his
the end of the year and making the credit at

urse, all proceeds upon the absolute good faith
tion, and there is nothing in the evidence to
s it suggested upon the argument, that the
acting otherwise. This adjustment of the
books of the company was made three months
nding-up order, and his payments were made
ny in the regular course of its affairs. This
scribes these payments as for "services," but
alter the nature of the payments, which have
the Master to have been as mentioned. In
ated, there is no necessity for considering the
winding-up order upon the general right of

l should be allowed with costs, and the appel-
n the list of contributories for $3.94, instead
his claim as a creditor will be reduced by

ant should also have his costs of opposing be-
er the attempt to place him on the list.

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BRITTON, J. MARCH 8

WEEKLY COURT.

RE TOWN OF BERLIN AND BERLIN AND
LOO STREET R. W. CO.

Street Railways—Municipality Assuming Ownership
—Value of Railway—Franchises and Privileg
ciple of Valuation—Addition of Percentage to
Found—Expiry of Time for Assuming Owner
toppel by Proceeding with Arbitration.

Motion by the Berlin and Waterloo Street Railv
pany to set aside an award of 3 arbitrators, da
December, 1906, awarding to the railway company
for their railway and property, or to increase the
or to revoke the submission, or for some order b
relief.

H. J. Scott, K.C., for appellants.

H. L. Drayton and J. A. Scellen, Berlin, for
corporation.

BRITTON, J.:— . . . Upon a special case
the arbitrators for the opinion of the Court, Ma
J., decided that sec. 65 of 6 Edw. VII. ch. 31 (O.)
the repeal of R. S. O. 1897 ch. 208, as affecting th
reference, and further that the parties are boun
agreement between them dated 21st June, 1906.
Town of Berlin and Berlin and Waterloo Street R
8 O. W. R. 284.

That decision is binding upon me. Upon the
nothing was abandoned, and every objection was
presented.

The main contention, as I regard it, presented,
the appellants were entitled as part of the value
railway and as part of the property used in co
therewith, to the franchises, operating agreeme
other contract privileges and benefits incidental t

It was conceded upon the argument that the a
cannot succeed unless this case is distinguished on
or by reason of the difference in the Acts which
from Stockton and Middleboro Water Board v. Kir
Local Board, [1893] A. C. 444 (House of Lords).

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stockton case the special Act provided "that
ired by the sanitary authority of any such out-
ct, the board should sell to such sanitary
e mains, pipes, and fittings belonging to
thin that district, at a price to be fixed, in de-
ement, by an arbitrator, and after such sale the
d cease to supply water within the district."
that upon the true construction of the special
d "price" meant price and not compensation,
fixing the price the basis of calculation should
he value of the mains, pipes, and fittings re-
ant in situ, capable of earning a profit, and that
or must not include in fixing compensation to
ything for the loss of the right to supply water,
utlying district.

rgued that in the Stockton case the question
sale and purchase, and that by sec. 41 of ch.
., there is no right given to the municipality to
obligation on the part of the railway company
it is here an assuming "the ownership of the
l all real and personal property in connection
rking thereof, on payment of the value thereof
mined by arbitration."

is any distinction between purchasing and as-
ownership of any property, I do not think it
etermining the question of what the municipal-
urchasing, or upon assuming the ownership, is
The municipality is to pay the value of the
l all real and personal property in connection
rking of it. How is this value to be ascertained?

nsaction is practically one of purchase. Section
ct (ch. 208, R. S. O. 1897), dealing with the case
company's line or lines is or are situated in two
unicipalities, and that is the present case, gives
nicipality in which is the greater mileage "the
ercise the power of purchase herein conferred."
es that "the corporation purchasing shall there-
ss all the powers and authority theretofore en-
e company." Again, sec. 45 speaks of the muni-
ration purchasing, and gives power to "transfer
o its railway lines or any of them, and the whole
t of the plant of the railway, to any railway com-
orized to operate a railway," subject again to the

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provisions of sec. 41 as to such railway being assume
municipal corporation entitled under that section.

Before the arbitrators Mr. Kappele contended t
was a sale of the railway—a sale of it as a going conc

In City of Kingston v. Kingston Light, Heat, and
Co., 3 O. L. R. 637, 1 O. W. R. 194, 5 O. L. R.
O. W. R. 55, affirmed by the Privy Council 20th April
the words "all the works, plant, appliances, and pr
of the company used for light, heat, and power pu
both gas and electric," were held not to include an
"for the value of the earning power or franchise
company."

In Edinburgh Street Tramway Co. v. Lord Prov
Edinburgh, [1894] A. C. 456, the decision was reallj
the following words, "shall sell to them their under
or so much of the same as is within such district, upon
of paying the then value of the tramway and all lands,
ings, works, material, and plant of the promoters su
to, and used by them for, the purposes of their undert
within such district." As I read that case, the de
would have been the same if the words in brackets
Act, which I have left out, were not there at all.

It was held that the word "tramway" was used
Act as meaning the structure laid down on the hig
and nothing more; therefore the value of the tramway
be measured by what it would cost, at the date of th
to construct the lines, subject to deduction for "
ciation, and that rental value must not be taken int
sideration."

The elaborate judgments in that case cover the
ground, but I do not need to make further citations
from. On principle I am unable to distinguish it fro
present case. The arbitrators were right in valuing
railway as being a railway in use, and capable of bein
and operated as a street railway." In that sense th
way was considered as a "going concern," but, apar
that, nothing was allowed for the value of any privil
franchise in Berlin or Waterloo. The arbitrators de
to adopt, as the principle of valuation, the capitaliza
the net earning power of the railway.

In my opinion, the arbitrators were right in do
last mentioned, and they were also right in refusing
10 per cent. to the value found. There is no au

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the statute applicable in this case, or under
nt between the municipality and company, to
ddition.

ount, the arbitrators appear to have gone very
refully into the matter. The evidence is very
and there is not as to any particular item or
ng upon which I can disturb the findings.

ellants object that the time within which the
rporation of the town of Berlin were to assume
ip of the property intended to be affected by
had expired before the publication of the said

ellants are not in a position to urge this objec-
present application, if at all. They went on
tion proceedings down to the making of the
ust deal with the objections as objections to an
in due course and as authorized by the Act.

ellants are not, in my opinion, entitled to suc-

ismissed with costs.

---

r, MASTER. MARCH 9TH, 1907.

CHAMBERS.

MORENCY v. WILGRESS.

n for Defamation—Defence—Money Paid into
mendment—Subsequent Acceptance by Plaintiff
Paid in.

y plaintiff for an order allowing him to take
the $25 paid in by defendant with the state-
ence, and for the costs of the action.

s are stated in the report of a previous motion,

ement of defence, after the order then made,
l by setting up secs. 13 and 16 of the Libel Act.

O'Connor, for plaintiff.

es, for defendant.

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THE MASTER:—Plaintiff, being confronted with
defences, now wishes to be in the same position as
still able to avail himself of Rules 423 and 424.

If the action proceeds, then the costs of the
motion, with all costs either lost or incurred by
the amendment of the statement of defence, will be
tiff in any event. That is the utmost that can be
him. If he should fail at the trial, defendant's gen
would far exceed those of the order to amend.

The present motion is tantamount to a confes
the action cannot succeed; or, if not going to tha
is an election to be content with the $25 if plaintif
that with costs. The question to be determined is
this can be done, and if not what is the utmost r
can be given to plaintiff.

Counsel for defendant is willing that the actio
be dismissed without costs, and that the $25 be
him. He thinks this even a generous offer on his

Had the facts been made known to the plead
time, sec. 13 would have been set up at first. S
could not have been pleaded earlier, as the neces
only came to defendant's knowledge on plaintiff'
ation for discovery. But sec. 16 would, no doubt,
allowed to be set up, even at the trial, on proper t

It was not through any fault of plaintiff that se
not set up at first, and, as I said before (see ante
"he is entitled to be in as good a position as if the
statement of defence had been delivered at first.
declined to allow the original pleas to be withdraw
reason. If that is the right position of the par
defendant admits that he wrongfully defamed pla
pays into Court $25 as ample satisfaction, and set
he has published what may fairly be styled "a com
abject apology." He is now allowed to plead sec.
This being done, plaintiff does not feel disposed
a trial, with the possibility of getting larger dam
the probability of having his action dismissed.

He therefore asks to be allowed to discontinu
his costs to date, and take out the $25. Unless
this, he is not "in as good a position as if the am
fence had been pleaded at first." From which
that plaintiff is entitled to the order asked for.

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THE

RIO WEEKLY REPORTER

(To and Including March 16th, 1907).

TORONTO, MARCH 21, 1907. No. 10

MARCH 8TH, 1907.

CHAMBERS.

EBSTER v. CONSUMERS' GAS CO.

OODDS v. CONSUMERS' GAS CO.

MILLS v. CONSUMERS' GAS CO.

EARD v. CONSUMERS' GAS CO.

of Actions — Application of Common Defend-
Trial of Test Action or Actions to be Tried to-

defendants from order of Master in Chambers,
smissing defendants' motion for an order con-
e actions.

eer, for defendants.

Pherson, for plaintiffs.

J., allowed the appeal, set aside the Master's
rdered that plaintiffs might elect which of the
any, they would have tried as a test action to
ability of defendants for damages; that, in the
intiffs electing to have a test action tried, the
e remaining 3 actions should be bound by the
e test action; that all further proceedings in
s. except the test action, should be stayed until
ould be given in the test action; that, in the

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event of plaintiffs electing to have a test action
costs of the trial thereof should be apportione
among the 4 actions; that, in the event of the ju
test action assessing damages, the other 3 actions
tried by separate juries on the question of dam
that, in default of plaintiffs electing to have a t
tried, the 4 actions should be tried together, with
Costs of appeal and motion below to be costs in t

CARTWRIGHT, MASTER. MARCH 11

CHAMBERS.

FALLIS v. WILSON.

Attachment of Debts—Salary of Policeman—Service ing Order on Treasurer of Municipality—Chequ ary Made out before Service—Recall before Deliver ment Debtor—Payment of Salary before it is Debt Due when Service Made.

Motion by a judgment creditor to make ab
attaching order.

B. N. Davis, for judgment creditor.

T. N. Phelan, for judgment debtor.

THE MASTER:—On 27th February an order
attaching all debts due or accruing due from the
tion of the city of Toronto to the defendant, who i
ber of the police force.

The order was made on an affidavit of the
solicitor that the defendant on his examination a
ment debtor admitted "that his salary was $90
payable monthly in equal instalments, which fall d
end of each month." This is admitted to be the f

The order was served on the city treasurer at
the 27th. No material was filed on behalf of the d
. . .

Three objections were made by counsel for def

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as contended that a policeman is not a servant f the city, and so the attaching order was not ved on the treasurer. The first branch of this is distinctly affirmed by 3 Edw. VII. ch. 19, 1 (O.). and the judgment of the Chancellor in rton, 26 O. R. at p. 623 (affirmed in Court of 8th November, 1895, not reported, but noted 22 But sec. 492 provides that the city council shall and pay such remuneration for and to the re- nbers of the force as may be required by the issioners. It seems, therefore, that the treas- e proper person to serve. . . . [Reference Trail, 12 Q. B. D. at p. 10.]

re think this objection fails.

s next contended that the cheque had come into f the defendant's agent before service of the as admitted on argument that the cheques for d been given by the treasurer to his messenger t the various police stations, according to the ch is set out in a manuscript judgment of the McDougall, which I have had the advantage of t appears that on being served with the order r telephoned to the messenger not to deliver nt's cheque, and it was accordingly brought back n his hands. In the absence of any affirmative the contrary, it seems clear that the cheque was control of the treasurer, as he was able to effect n transitu.

re think this objection fails.

last objection is that there was no debt due at service of the attaching order.

lavit of plaintiff's solicitor has been already re- nd there is no other evidence of the terms of employment. Then under Hall v. Pritchett, 3 15, there was nothing debitum in præsenti, as salary was not "a debt of which the judgment l have compelled payment if he had desired to Bacon, V.-C., in Chatterton v. Watney, 16 Ch. To the same effect is the judgment of late Sir on in Shanly v. City of London, 3 P. R. 223. be something due at the time. If it is payable Rule 911 would apply, and an order would bind

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the debt. There is no law which forbids an employer t
his servant's wages in advance. And the case of Wils
Fleming, 1 O. L. R. 599, seems to shew that salaries o
city officials can never be successfully attached unless
are held over for at least one day, and no cheques ar
livered until then. If any one to save himself anno
deliberately pays in advance, the creditor is helpless
this could not be done, the master would be obliged t
miss the servant, who would starve unless he left
country.

Under the circumstances the order will be discha
without costs. There will be a stay for two days to
the plaintiff to appeal if so advised.

MULOCK, C.J. MARCH 11TH,

CHAMBERS.

CONWAY v. GUELPH AND GODERICH R. W. C

*Consolidation of Actions — Application of Common D
ant — Different Plaintiffs with Different Solicitor
Interests—Trial of Actions together—Application to
Judge.*

Appeal by defendants from order of Master in Chan
ante 369, dismissing defendants' motion to consolidat
action with three others against the same defendants
have them tried together.

Shirley Denison, for defendants.

W. H. Blake, K.C., for plaintiff McGarr.

W. A. Skeans, for plaintiffs Conway, Purcell, and H

MULOCK, C.J.:—The plaintiffs were arrested for a
trespass, and after an inquiry before the magistrate
acquitted. Thereupon these four actions against th
fendants for false arrest and malicious prosecution
commenced and are now at issue.

The venue in three of the cases is laid at Goderic
in the fourth at Stratford. Two of the plaintiffs a

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by the same solicitor, the remaining two by sep-
itors, and all object to the order asked for by
. Each plaintiff has a separate cause of action,
e plaintiff has any interest in any of the other
action. Under these circumstances, to deprive
of control of his own action and intrust it to a
who has no interest in the plaintiff's success,
I think, a wholly unwarrantable interference with
ff's right to prosecute and present his claim be-
ourt, either personally or by a representative of
lection, whose sole interest is that of his client.
eason, in addition to those pointed out by the
aster, this appeal should be dismissed with costs.
t improbable that there would be a saving of ex-
he four actions were tried at the same Assize,
pen to defendants to endeavour to bring about
rangement, and, in the event of failure, to lay the
ce before the trial Judge for consideration,
have to deal with the matter of costs of the

J. MARCH 11TH, 1907.

TRIAL.

MILLS v. SMALL.

*t of Chose in Action—Assignee of Money Demand
nment made for Purposes of Suit—Absence of
or Interest in Assignee—Status of Assignee as
ff—Leave to Add Assignors as Parties.*

to recover moneys due for work done by plaintiff
hers, whose claims were assigned to plaintiff, in
stances mentioned in the judgment.

Bicknell, Hamilton, for plaintiff.

ounsell, Hamilton, for defendant.

L, J.:—Plaintiff, a contractor in Hamilton, and
ctors in New York, had done some work and
improvements to a theatre in Hamilton. The
sing to pay, the solicitors for the New York

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contractors, without the knowledge of plaintiff, and
sole purpose of enabling the claims of the New Y
tractors to be pressed in the name of plaintiff,
New York contractors execute an assignment, abs
form, of their claims to plaintiff. The solicitors c
cated this to plaintiff, and agreed on behalf of thei
in New York that they should indemnify him again
and guarantee him payment of his claim. These f
admitted by plaintiff and his solicitor (and couns
the utmost frankness, and further that this was
form—"machinery"—to enable these debts to be
in the name of plaintiff. It never was intended th
tiff should collect the debts or have any control
any interest in the proceeds. As he says, he "was
no rake-off." This plan was adopted apparently
entirely laudable purpose of saving costs. I see
wrong or blameworthy in the transaction, but it i
that this is not an "absolute assignment" within
sec. 58 (5).

The case is, I think, concluded by Wiesmer v.
76 L. T. 448 (C.A.). There foreign creditors assi
the plaintiff, by a document absolute in form (as
case), a claim which they had against the defend
enable him to sue in his own name in England as a
the assignors, the arrangement being that the
should deduct his commission and expenses and pay
balance to the assignors. The trial Judge (Bruce, J
p. 449: "Under the circumstances, the transaction
a transaction of assignment, but it was merely a tra
under the cover of an assignment, to appoint the
as agent on behalf of the assignors;" and consequ
dismissed the action. The Court of Appeal reve
decision of the trial Judge, but upon the question
Lord Esher, M.R., says: "I am of opinion that if th
of fact of Bruce, J., could be maintained, the plaint
not recover in this action;" but disagreed with
Judge and held that the creditors intended to pass
right to the debt, keeping for themselves the equita
to the money when recovered. And, indeed, tha
seem to have obviously been the case, as the assig
intended to recover the money, take out some of i
own trouble, and then remit the balance to the
—or, as the trial Judge puts it at p. 449: "When

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ered, they (the assignors) were to be credited with
nt less commission and expenses." . . .
ence to Comfort v. Betts, [1891] 1 Q. B. 737.]
present case, however, the facts are different.
n, and indeed admitted, that plaintiff never was
to collect the moneys; he never was intended to
tion to give a valid receipt for the claims; his soli-
e retained and paid by the assignors; he had no
over the solicitors; he was not the real dominus
the transaction was "merely a transaction, under
of an assignment, to appoint the plaintiff as agent
of the assignors."
the objection is a valid one. Plaintiff is to be
to add the assignors as parties plaintiffs; this
done forthwith. I shall then try the questions of
week of 29th April. The costs will be reserved.

MARCH 11TH, 1907.

DIVISIONAL COURT.

EATES v. GRAND TRUNK R. W. CO.

Animals Killed on Track—Escape from Adjoining ure—Defective Gate—Agreement between Railway ny and Owner of Land that Latter should Provide g and Gates—Absence of Knowledge of by Ten- Effect of—Liability—Railway Act—Contributory ence.

by plaintiff from judgment of County Court
on dismissing action brought to recover damages
s of a horse and 3 cows which escaped from plain-
sure and got upon defendants' railway and were

peal was heard by FALCONBRIDGE, C.J., BRITTON,
L, J.
r, Sarnia, for plaintiff.
Foster, Montreal, for defendants.
owan, K.C., for a third party.

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BRITTON, J.:—The third party, Angus Jamieson owner of all of lot 24 in the front or 9th conce township of Sarnia, except that part taken by def for their right of way. On 7th April, 1906, Jamieso a lease of this land to plaintiff for one year from 1s 1906. On 6th September, 1906, the animals m got from the above land, where they were lawfully ing, upon the railway, and they did so because of tive and insufficient gate or an insufficiently faster at the farm crossing.

Plaintiff asserts and seeks to establish liability part of defendants on two grounds: first, under the Act, 1903, 3 Edw. VII. ch. 58, sec. 237, sub-sec. second, under sec. 199 of that Act.

As to the first, in my opinion, sec. 237, sub-sec. not apply to the case of animals getting upon the from an adjoining field or enclosure, but applies animals at large upon the highway, or otherwise a It can have no reference to animals escaping from joining field, where, apart from any defect in the fence, they were properly enclosed. If the broad contended for by plaintiff could be given to this sec fendants would be liable for the loss of animals in which no breach of duty on the part of defendants shewn. Sub-section 4 is very badly worded, and not easy of clear interpretation, but it was intended the meaning put upon it as it appears in the R. S. ch. 37, sec. 294, sub-sec. 4, and sec. 295. . . .

As to the second, there is more to be said. The doubt, primarily, the liability to fence, and the law (a) "fences of a minimum height of 4 feet 6 inches side of the railway;" (b) "swing gates in such fe the minimum height aforesaid, with proper hinges tenings, at farm crossings, providing that sliding o gates already constructed may be maintained."

The defence upon this branch of the case is p two grounds:—

First, an express agreement between the third p defendants that this crossing was for the owner's ience, and he should assume all responsibility fo defendants should not be under any liability in to it.

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t is said that this agreement was known to plaintiff, ntiff accepted the lease subject to it, he agreeing owner in reference to it, as the owner had agreed endants.

t is argued that, without any such knowledge on the plaintiff, and without any agreement between him andlord, he stands, as between him and defendants, etter position than the landlord.

second, contributory negligence on the part of

rial Judge found that such an agreement was made hird party with the defendants. There is not . . ess finding that plaintiff knew of this agreement endants, and there is no finding of any undertaking nent on plaintiff's part to look after the crossing or fences or gates thereat. There is evidence that aintiff called upon the third party shortly before was executed, and when the proposed lease was , Mrs. Jamieson (wife of the third party) notified that the crossing was theirs, and that plaintiff responsible for it. . . .

was the agreement between Jamieson and defend- amieson's account of it is that he wanted this as a second crossing; that some person . . . to represent defendants came to Jamieson and that he (Jamieson) could put in the crossing, pro- did it himself, and would take it up afterwards, d keep his gates up, and that defendants would sponsible for anything that he would lose on that -and Jamieson did build the crossing, and did the gates, and he kept the gates and crossing in wn to the time of leasing to plaintiff. The Judge upon evidence quite sufficient to warrant the find- such an agreement was made. Such an agreement r the authorities, sufficient to exonerate defend- etween them and Jamieson, from liability to acci- rring by reason of the gates at that crossing. . . ence to Villaire v. Great Western R. W. Co., 11]

ne that the animals got upon the railway not by the gate being left open, but solely by reason of nd its fastenings being defective and insufficient.

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The owner of the land, for his own convenience and constructed the gate and accepted it, and that by a waiver of the statutory duty to fence, and, as to resulting from what he did, an exoneration of de from liability.

Then is plaintiff, assuming that he did not kno agreement of his landlord, bound by it? . . . plaintiff is bound by the agreement, whether l of it or not, and I agree with the Judge that the c of Corry v. Great Western R. W. Co., 7 Q. B. D authority for it. . . .

Then this case is within Kilmer v. Great We W. Co., 35 U. C. R. 595. . . . Although not t point in that case, the same principle is involved. Here unquestionably the defective gate and faster this crossing and the crossing itself were placed, assent of all parties then interested. Plaintiff kne defects and danger. He did not call upon his lan defendants to put up a proper gate and fastenings.

For these reasons, I think the appeal fails.

As to contributory negligence, I agree with Judge in his conclusion that were it not for th ment which the third party made with defendants, ants would be liable in this action. Plaintiff woul disentitled to recover merely by reason of his conti of the faulty gate and its fastenings. If, as betw and defendants, it was the duty of defendants to and maintain proper gates and fastenings as presc statute, such knowledge as plaintiff had and suc plaintiff made of the gate and fastenings as th would not warrant the conclusion that plaintiff had them as sufficient. See McMichael v. Grand Trun Co., 12 O. R. 547; Dunsford v. Michigan Central R 29 A. R. 577; Studer v. Buffalo and Lake Huron R 25 U. C. R. 160.

RIDDELL, J., gave reasons in writing for the s clusion.

FALCONBRIDGE, C.J., agreed that the appeal dismissed with costs.

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MARCH 12TH, 1907.

TRIAL.

v. HAMILTON, GRIMSBY, AND BEAMS-
VILLE ELECTRIC R. W. CO.

*– Injury to Person — Street Railway — Horse
d by Electric Car—High Speed and Noise—
Motorman—Findings of Jury.*

recover damages for personal injuries sus-
aintiff owing to the alleged negligence of de-
the circumstances set out in the judgment.

n was tried with a jury at Hamilton.

artin, Hamilton, and J. D. Gausby, Hamilton,

sbitt, K.C., for defendants.

J.:— . . . Plaintiff and his father were
waggon in the streets of Hamilton, when they
ing a car of defendants going at a high rate
making a great noise. The horse driven by
her became frightened and began shying and
it did not actually get out of control until
reast of the car; it then broke off to the side,
aintiff out, thereby breaking plaintiff's leg.
slackening of the speed of the car; and it was
had the car slackened its speed the accident
ave happened. . . . The jury found that
was caused by the negligence of defendants
t such negligence consisted "in not slackening
the car."

for a nonsuit was argued with a motion for
both parties. Mr. Nesbitt contends that the
was out of control until the car was opposite
and argues that the case is governed by Myers
Street R. W. Co., 31 O. R. 309, 27 A. R. 513;
v. Toronto R. W. Co., 2 O. L. R. 18. I, of
e to the proposition that I am bound by these

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cases; but I think they tell against the defendants.
the principle that "it is the duty of a motorma
ating an electric car upon a public street, if he sees
in the street before him that is greatly frightened
car so as to endanger the driver or other persons
street, to do what he reasonably can in the manage
his car to diminish the fright of the horse; and it
his duty in running the car to look out and see w
by frightening horses or otherwise, he is putting
other persons lawfully using the street on foot
teams:" 31 O. R. 309.

I do not understand that this principle is questi
the Court of Appeal—that Court reversed the Di
Court upon a question of fact.

The Robinson case does not question this princ
is pointed out by Osler, J.A., at p. 28, that all that
expected of the motorman under such circumstances
he shall proceed carefully, and the evidence shewed t
motorman had done all that he reasonably could t
the accident. See per Moss, J.A., at p. 29. A case
Court of Appeal in England, Ratter v. Norwich
Tramway Co., 18 Times L. R. 562, is instructive. T
in that case are very like those in the present, and a
for the plaintiff was upheld.

There was ample evidence upon which the jur
find that the motorman saw that the horse was fri
(as I think the fact is), or should have seen this, a
he did nothing to avoid the accident which seemed
but that, on the contrary, he came on negligently
speed, and that this was the cause of the injury.

I agree in all respects with the findings of the
amount of damages included, viz., $200—and had
trying the case I should have given precisely the sa
swers as the jury have done. I see no reason for giv
special direction as to costs.

The judgment will be entered for the plaintiff f
and costs on the proper scale. Stay for 30 days.

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JANUARY 12TH, 1907.

DIVISIONAL COURT.

EVANS v. JAFFRAY.

ip—Account—Payment by Partner—Credit for—
deration—Services in Introducing Partner to Capi-
—Voluntary Payment—Amount Allowed.

l by defendant Jaffray from order of MAGEE, J.,

Kay, for appellant.

Boland, for plaintiff.

COURT (MEREDITH, C.J., MACLAREN, J.A., MAC-
J.), varied the order of Magee, J., by declaring that
t of the sum of $5,000 defendant Jaffray is entitled
for $1,000 paid by him to Joshua T. Johnston, and
ctual value of the $4,000 of stock of the Canada
e Manufacturers, Limited, transferred by defendant
o Johnston, as at the date of the transfer of the
d further amending the order by striking out para-
thereof, and inserting in lieu thereof the following,
hat the report of the Master at Sandwich dated
ary, 1907, be referred back to said Master to in-
d state what was the actual value of the $4,000
the Canada Furniture Manufacturers transferred
fendant R. M. Jaffray to Joshua T. Johnston at the
aid transfer; and that defendant R. M. Jaffray do
t for the sum of $1,000 paid by him to said Joshua
ton and for such additional sum as may be found to
ctual value of the said $4,000 stock in the Canada
e Manufacturers, Limited," and the last preceding
h of the order.

of this appeal to be costs to the appellant in the
directed.

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MAGEE, J. JANUARY 1
MARCH

DIVISIONAL COURT.

TOWNSEND v. STEPHENS AND WAL

Trusts and Trustees—Mining Lands—Sale of Un terests—Dispute as to Extent of Interests— Writing — Evidence — Corroboration — Dec Title.

Plaintiff alleged that he had bought, in 189 defendant Stephens, and paid for, one undivided able interest in 320 acres then standing in defe ton's name, and asked to be declared entitled fendant Stephens alleged that plaintiff only half of the one-fifth, and that he, Stephens, other half. The defendant Walton, as trus neutral.

MAGEE, J. (after the trial):—Before 1888 bought the land, which was in the nickle min near Sudbury, in Algoma, from the Crown for his business partner Brown. They they sold o terest to defendant Stephens. Then one Sam and one Grant acquired each one-fifth interest three, and Walton, Brown, and Stephens had fifth less. There were no writings to represent chases and changes. The title stood in Walton sole absolute owner, a certificate of ownership Land Titles Act being issued to him on 26th J

The plaintiff and defendant Stephens were accountants from 1887 to 1892, having offices i and Toronto, the plaintiff attending chiefly to t business and the defendant Stephens to that in Walton and Brown were real estate dealers i Walton was frequently in plaintiff's office in Tor this property was often talked about, and th though not interested till December, 1891, k partner Stephens having an interest in it with f and that these four were Walton, Brown, B Grant. He asserts that he did not know wh Stephens had, but supposed that they had all e

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plaintiff says, Stephens urged him to buy an
e-fifth interest, he says it was—in the property,
ly agreed to do so for $1,100. He says he did
d did not know whose interest it was, but it
ne-fifth, and when bought he was to have an
with the others, and he knew he was joining
Stephens says it was plaintiff who was desirous
Beatty's interest, and that he negotiated with
laintiff's request. As Beatty was in fact the
o was leaving the venture, and there does not
ave been any one else spoken of and no reason
nent, it must, I think, on all the evidence, be
laintiff knew that the 4 with whom he would be
ould be Stephens, Walton, Brown, and Grant,
atty was going out.

paid Stephens $1,100. . . . Stephens says
aid this $1,100 over to Beatty. . . .

Walton conveyed the land to Stephens, who
s trustee for himself and the others interested,
so declared in writing. Thus he then held a
of the legal estate in his own three-tenths as
others. By a restriction dated and registered in
93, Stephens declared that the land should not
ed or charged without the written consent of the
own, Walton, and Grant. In February, 1903,
conveyed to Walton, who again holds really as
himself and the others interested, though not
in writing.

en that before 1888 the defendant Walton held
tate in fee, subject to the reservations set out
ficate of title, and that by verbal agreement he
trust for himself, his partner Brown, and the
Stephens, in equal undivided shares; that after-
ike verbal arrangement, Beatty and Grant ac-
them each one undivided fifth beneficial inter-
was agreed that Walton should so hold in trust
equal shares; that in December, 1890, Stephens
nd acquired by verbal arrangement between him
one-half of Beatty's one-fifth interest, and this
e knowledge and consent of Walton, who was
o hold in trust as to three undivided tenths for
d as to one undivided tenth for Beatty: that
d notice of such purchase before he agreed to

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acquire any interest in the lands; that plaintiff l
reason to believe that Beatty had more than one un
tenth interest in the lands at the time he purchased
interest therein. The assignment from Beatty does n
port to be a sale of an absolute one-fifth, but of all
interest in one-fifth, leaving it open to inquire wh
interest then was. He had never had any conveyanc
one-fifth, and before plaintiff appears upon the sc
parties had settled "by word of mouth" what their
tive interests were, just as they had previously varie
Had Beatty himself tried to repudiate the sale to S
of one-tenth, he might have been met in turn by a
ation of his whole fifth. They had chosen how the
do their business, making the trustee their registr
and they had done all this at a time when plain
nothing to do with them. The corroboration g
Stephens as to the fact of his purchase from Beat
the price paid, operates of necessity strongly to corr
his denial that he was a party to a sale of double the
est for the same price, and the corroboration given h
the knowledge by the plaintiff of that purchase, de
that is by the plaintiff, tends also to weaken the rel
be placed upon the plaintiff's accuracy of recollec
that I cannot hold the defendant Stephens to be esto
this respect by representation that Beatty was th
owner of one-fifth. The trustee Walton says he ha
entered the plaintiff as owner of more than one-ten

The defendant Stephens at the trial asked and
corded leave to plead the Statute of Frauds, and t
plaintiff as assignee of Beatty was not entitled to cl
interest in the lands, but, whatever interest the
may be equitably entitled to, I hold the defendant S
to be estopped from setting up that under the
Beatty was not entitled to it and to convey it wh
were one-fifth or one-tenth. The trustee Walton d
set up the statute and is ready to acknowledge th
of whoever may be declared entitled.

The plaintiff's action must be dismissed, except i
as to declare that he is entitled to one undivide
interest.

The question of partnership accounts between th
tiff and defendant Stephens set out in the pleadings
agreed should not be dealt with, and the judgment

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judice to any rights of either party in respect

ntiff is to pay the costs of the defendant Walton
ts of the defendant Stephens, except in so far as
creased by the pleading of the partnership mat-
d to.

appealed to a Divisional Court.

Ritchie, for plaintiff.

pence and G. C. Thomson, Hamilton, for defend-
ns.

URT (MEREDITH, C.J., MACMAHON, J., ANGLIN,
sed the appeal with costs.

IT, MASTER. MARCH 13TH, 1907.

CHAMBERS.

BRITISH NORTH AMERICA v. NEWMAN.

Judgment—Rule 603—Leave to Defend—Costs of — Defective Special Indorsement — Promissory yable on Demand—Days of Grace.

by plaintiffs for summary judgment under Rule
ction upon a promissory note made on 17th Janu-
payable one day after demand.

ion was begun on 18th February, and defendants
n 23rd.

McMaster, Toronto Junction, for plaintiffs.

trathy, for defendants.

ASTER:—The affidavits of the defendants allege de-
h, if proved, will defeat the action, so that the
t fail. It was contended that the costs should be
nts in any event, because the indorsement is not
s it does not allege any demand. See May v.
894] 1 Q. B. 451; Fruhauf v. Grosvenor, 61 L.
7, 8 Times L. R. 744.

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This can be alleged, if the fact is so, in the st
claim. The plaintiffs will do well to consider wh
would not be days of grace after demand unde
1906 ch. 119, sec. 24. It may turn out that the
premature. However that may be, I think the
be as asked for by Mr. Strathy.

It should not be forgotten that a special indo
equivalent to a statement of claim in some cases.
therefore, state all material and necessary facts i
is to be asked for before delivery of statement
Parties "in their pleadings ought to state every
which they must rely to make out their right or
Brett, L.J., in Phillips v. Phillips, 4 Q. B. D. 1

RIDDELL, J. MARCH 1

TRIAL.

FINDLAY v. HAMILTON ELECTRIC LIG CATARACT POWER CO.

Negligence—Injury to Person by Electric Wire— to Highway—Findings of Jury—Knowledge

Action to recover damages for personal injuri
by plaintiff by reason of the negligence of defe
alleged, tried with a jury at Hamilton.

G. Lynch-Staunton, K.C., for plaintiff.

W. W. Osborne, Hamilton, for defendants.

RIDDELL, J.:—On 19th June, 1906, a wire of
carrying an electrical current of high voltage,
quently very dangerous, was found to be hanging
a crossing. Plaintiff about 7 o'clock p.m. in some
in contact with this wire and received very seve
While plaintiff cannot remember, a witness f
ants says that she and the plaintiff had been tal
the wire a very few minutes before the accident.

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ry found that the injury to plaintiff was the
he negligence of both plaintiff and defendants
one only, the negligence found against the de-
eing "by not properly being maintained" and
plaintiff "by coming in contact with the wire."
the motion for nonsuit and that for judgment

idence for the plaintiff—that of an expert of
ing—shewed that if the line had been properly
properly maintained, the wire could not possibly
ito the position in which it was found.

idence avoided the necessity of my considering
gligence is prima facie shewn on the part of an
nt company by proof that a wire carrying a dan-
rent is found in dangerous proximity to a public
On this Haynes v. Raleigh Gas Co., 26 L. R. A.
enver City Electric Co. v. Simpson, 31 L. R. A.
e notes to each, may be looked at as well as . . .
Toronto Electric Light Co., 12 O. L. R. 413, 8
, . .

ed I consider whether the principle of Fletcher
L. R. 3 H. L. 330, applies to electricity conveyed

the evidence mentioned is sufficient to enable
ose of the motion for nonsuit adversely to de-

e answers of the jury, and their effect, I think
ny charge the jury must be taken to have found
hat the plaintiff actually took hold of the wire
ew that it was dangerous or when he should have
as dangerous, or (2) in such a state of knowledge
tly came too near the wire—and that this was
cause of the accident.

assent to the argument of Mr. Lynch-Staunton
plaintiff did not know or if it could not be said
ould know that the wire was dangerous, the
ld not be considered as in fault if he came in
the wire—even intentionally. But that is not,
at the jury mean—the jury must have meant
mentioned above.

regard it as of importance that the jury have
ered other questions directed to bringing out

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findings of fact more specifically. No doubt t
ered the answer to question 7 sufficient, and I
them.

The action will be dismissed with costs.

RIDDELL, J. MARCH

TRIAL.

MARKLE v. SIMPSON BRICK CO

*Negligence—Master and Servant—Injury to an
Servant—Action by Widow for Damages—
Jury—Accident—Cause of.*

Action by the widow of James Markle to re
ages for his death while in the employment of
owing to their negligence, as alleged, tried wit
Hamilton.

M. J. O'Reilly, Hamilton, for plaintiff.

G. Lynch-Staunton, K.C., for defendants.

RIDDELL, J.:—James Markle entered into
of defendants, a company carrying on the busine
facturing brick. It was part of his duty to pu
tramway toward and upon a transfer way a car
brick. A perfectly safe method of doing this w
by the side of the car, start it, and then follo
hind. Instead of pursuing this course, the
man went in front of the car, and the car, "j
track" at the transfer way, caught and injure
died shortly thereafter. . . .

In answer to the question "Was the casua
accident or was it due to negligence?" the jury
mere accident." They further found that the d
been instructed by his foreman not to go in f
car, and that it was not reasonably necessary
go in front of the car, though his going in f
car was not the cause of the accident.

If the casualty was a mere accident, as th
found upon evidence justifying that finding, the
are entitled to succeed.

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e is another ground upon which I think it is that defendants must succeed.

have found that the deceased was disobeying hen he put himself in the position in which he e casualty took place; and it is not disputed—disputed—that had he not put himself in this would not have been injured. It is true the ind that his going in front of the car was not the accident; and perhaps in a sense that is going in front of the car should be more proed as a condition than as a cause. If the nything further than this, there is no evidence ch a finding.

nts he was in a place in which he had no right ren were he a third party and not an employee, ative is not entitled to recover. The much of Randall v. Ottawa Electric Co., 6 O. L. R. R. 146, 1022 (sub nom. Randall v. Ahearn), 98, and after the second trial, 6 O. W. R. 913, on that point. And his position as employee ants makes the case stronger against him than ase was.

n should be dismissed with costs.

MARCH 14TH, 1907.

TRIAL.

ECTRIC CO. v. HAMILTON ELECTRIC HT AND CATARACT POWER CO.

—Action for Price—Contract—Failure to Fill nts of—Tests—Evidence—Acceptance of Goods t, notwithstanding—Retention of Goods—Failtify Vendors—Defects in Goods—Right to Deom Price—Counterclaim for Damages—Measmages—Property not Passing—Construction of -Special Terms—Judgment—Reference.

recover $27,641.98 alleged to be due to plainopen account for goods furnished to defend-

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ants, with interest thereon: for payment of $3
leged to be the balance due in respect of 2,00
ators supplied by them to defendants, with intere
and for $40,000, the amount of a promissory no
defendants on account of the purchase price of
ators and of goods supplied, and interest there
the alternative for other relief.

The original contracts were between plaintiff
Electric Co. and defendants; but, by certain
the co-plaintiffs, the Montreal Light, Heat, and
acquired an interest in the business of the Ro
Co., and for the purposes of this action it was
both these companies should be deemed vendors
ants, both entitled to recover any moneys due fr
ants in respect of the matters in question, and bo
able to defendants for any damages to which the
entitled for breach of any obligation of either o
tiff companies to them.

Liability upon the open account, under cont
December, 1897, was not disputed by defendan
accuracy of the amount claimed by plaintiffs w
ceded, and this, it was agreed, should be the s
reference.

Defendants contested their liability to pay
generators, and also counterclaimed for damage
have been sustained by them because of their
fulfil contracts and meet demand for electric e
as they charged, to the failure of plaintiffs to su
ators conforming to the requirements of the sp
embodied in their contract with defendants.

W. Nesbitt, K.C., G. T. Blackstock, K.C., I
K.C., and H. E. Rose, for plaintiffs.

G. F. Shepley, K.C., and W. W. Osborne,
for defendants.

ANGLIN, J.:—The questions for trial are: fi
the electric generators furnished by plaintiffs
conform to the contractual requirements; seco
whether defendants have by their conduct placed
in such a position that they should be deemed
cepted the generators, though substantially defe
whether, if the generators were substantially de

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on that account entitled to damages, and, if so, basis.

tract by which plaintiffs undertook to furnish tric generators bears date 4th December, 1899. aterial, it is as follows:—

al Electric Co. agreed to sell and defendants to nder and according to (inter alia) the specifica- oned below, "two S. K. C. alternating current, inductor type generators, each having a term- capacity of 2,000 kilowatts, non-inductive load ted at 286 revolutions per minute, and at an ve force of 2,400 volts at a frequency of 8,000 per minute.

gulations of these generators at full non-induc- ll be 7 per cent., and at a power factor of .9 will cent.

ise of temperature above the surrounding air non-inductive load, for 12 consecutive hours, degrees centigrade, and with 15 per cent. addi- inductive load for 3 hours immediately there- ise in temperature will not exceed 45 degrees and with a power factor of .9 the rise in tem- er 12 hours' run at full load will be not more rees centigrade.

power factor of .9 the generators will each carry d load in volt amperes with an increase of field f not more than 18 per cent. between no load d.

generators will be so designed and constructed ill be capable of operating thoroughly and com- arallel with either or both of the S. K. C. gen- resent in the power-house of the purchaser at , and will be their equal in every particular.

tract also contained these provisions:—

mpany will correct any defects which may deve- foregoing described apparatus under normal usage of it within one year from the starting d shall not be held liable for any defects there-

urchaser agrees that no part of the apparatus ed by a greater load than it is rated to operate,

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and that the instructions given as to the operati
will be carried out. . . .

"And it is hereby agreed, subject as herein
provided, that the property and title of the plan
pass to the purchaser until the purchase money
given therefor, or by way of renewal (if any),
been fully paid, but the plant shall remain th
of the company until that time, and in case of
payment of the purchase money, or any part there
vided in this contract, on the due date or dates th
the whole purchase money and any note or note
account thereof, shall forthwith become due an
and the company shall be at liberty without proc
to take and remove the said plant and machine
cover all such costs and damages as they may hav
in consequence of such default, and the said
hereby waives all claims for damages which mig
tained by reason of the said removal."

Under this contract the two electric generato
tion were installed in defendants' power-house
Complaints from defendants of the inefficiency o
erators, and demands from plaintiffs for paymen
tures of the correspondence which passed betwee
of the original installation and 11th January, 19
further agreement, to which I shall presently
fully, was entered into between plaintiffs and
Upon the evidence I have no doubt whatever —
find—that down to the time at which the gener
reconstructed under this agreement of 1902 th
meet the requirements of the contract of Decem
in a most material particular. . . . The ser
haps which befell these generators, ascribable, i
ion upon the evidence, chiefly, if not entirely,
jurious effects of excessive heating of the arma
culminating in the reconstruction agreement o
1902, put it quite beyond doubt, I think, that
time, at all events, these generators did not fu
quirements of the contract under which they wer

The agreement of January, 1902, made betw
tiffs and defendants, so far as material, is as fol

"Whereas it is claimed by the Cataract Co
said generators do not comply with the terms and

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contract (4th December, 1899), nor conform to
tions thereof, which claim the contractors do
ut are desirous of satisfying the Cataract Co. . .

erefore these presents witness

t the request of the contractors, the Cataract
o place at the disposal of the Stanley Electric
ng Co. the said 2,000 K.W. generators from
next to 22nd June next, but only one of the said
t a time, and the contractors agree that they
the Stanley Co. to make such alterations as may
to make the said machines or generators con-
specifications contained in or referred to in the
ent of 4th December, 1899, it being further
e Cataract Co. that, if necessary, one of the
all be at the disposal of the said Stanley Co.
ptember next to 15th September next. . . .

rther agreed between the parties that within
each generator is installed and ready for oper-
taract Co. shall make such tests as it may deem
ascertain whether such machines or generators
the contract and specifications, and, unless the
found defective, the full contract price in re-
shall be due and payable; but it is also agreed
iod of one year mentioned in the said contract
referred to, within which the contractors were
fects, shall run from the date of the satisfactory
of the said generators.

d contracts and the rights and liabilities of the
rties herein shall not be affected by this agree-
t as herein expressly stipulated and provided

is agreement the Stanley Company secured pos-
two generators, and reconstructed them. The
ucted generator was installed in July, 1902, and
September, 1902. The first generator was
th July, in presence of the representatives of
the Stanley Co., and was found not to meet
nents of the specifications as to temperature
vas materially in excess of that specified in the
December, 1899. . . . The other generator
tested . . . on 21st September, 1902. . . .
. . . . a great controversy has been waged.

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. . . My conclusion is that the test made
21st September, 1902, sufficiently shewed that t
installed about a week before did not then fulfil
ments of the contract of December, 1899, in re
perature rise. . . .

The generator which had been installed
again altered in October or November by the
so as to make it in all respects identical with
had been installed as reconstructed in Septembe
erator so altered was not again tested, it be
apparently that it might be expected to give
sults as were obtained from its prototype.
events . . . confirm me in the view that
structed generators . . . did not in fact co
contract and specifications. . . .

It follows that the obligation to make paym
by clause 3 of the reconstruction agreement
not arise, and that the parties were remitted to
and obligations under the original contract o
1899.

Several breakdowns, owing to destruction
in the armature coils due to excessive heating,
the winter of 1902-3. Complaints on this acco
ther demands of payment by plaintiffs are foun
respondence between the parties up to May, 190
action was begun. . . .

I am convinced (and I so find) that the t
generators supplied by plaintiffs to defendants
any time, either before or after reconstruction,
commencement of this action, fulfil the require
contract under which they were furnished. .

It becomes necessary to consider the questi
ance. For this purpose the period before re
must be distinguished from that after recons
before suit.

During the earlier period from the time of
lation there is a record of trouble with the ge
the correspondence contains frequent complai
downs owing to burning out of coils which ar
improper design. Plaintiffs from time to time
payment; defendants put them off. They ma
ments on account, but, as the contract covered

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es which were furnished and accepted by defend-
e payments would not necessarily signify an ac-
of the generators. . . .

the facts disclosed by the correspondence and the
I am satisfied that up to the time of the agreement
y, 1902, there had been no acceptance of the gen-
defendants, and that if, owing to their retention
y defendants, plaintiffs might have been in a posi-
sert that there had been an acceptance, the agree-
anuary, 1902, is only consistent with a waiver by
of any such right.

fter reconstruction and re-installation, I cannot
same view of the conduct of defendants. Under
struction agreement they bound themselves to pay
ontract price, unless within two weeks after re-
n they should by such test as they deemed neces-
he generators defective. They made a test of one
in September, which, I have found, sufficiently
d that it was in fact defective. The other genera-
tedly defective when re-installed in July, was
October or November, 1902, when it was made a
the generator tested in September. It was not
sted, defendants relying upon the test of its pro-
establish that this generator was also defective.
hey had a right to do so is, in the view I take, im-
Assuming that they had, they were then, in the
f any provision to the contrary, by the terms of
struction agreement remitted to their rights and
s under the original contract. They knew as to
ator on 21st September, 1902, and as to the other
ore 10th November, 1902, that the contract re-
s were still unfulfilled. They so state in their
10th November, 1902, to plaintiffs. Their duty
definitely to accept or reject the generators and
plaintiffs of their election. They gave no such
plaintiffs. Meantime they made such use of the
s as they could in their power-house. They re-
ntrol of them. They gave plaintiffs no opportun-
rcising any right they might have to take the gen-
way and make such disposition of them as they
right to which they would be clearly entitled if
s should reject the generators.

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Defendants were entitled to a reasonable tim
to determine whether or not the generators
structed fulfilled the contract: Street v. Blay, 2
456. At the expiration of that time, if they wish
them, they were bound to notify plaintiffs of th
to do so, and to refrain from further use of t
they obtained plaintiffs' consent to their contin
them without acceptance, and with a view to
possible damage. They did not so notify plai
they continued to use the generators without any
from plaintiffs. Having regard to all the circ
and particularly to the terms of the reconstruc
ment, the retention and use of the generators—
1 after 21st September, 1902, and as to No. 2
November, 1902—amounted to an election by de
forego any right of rejection they might have an
the generators under the contract, saving any rig
ages sustained by reason of defects in the genera
tric Construction Co. v. Hurry and Young, 24 Re

It is contended that because defendants could
themselves with efficient machines to replace the
furnished by plaintiffs, they should not be held
compliance with the requirement that they sh
with cease to use these generators. I cannot co
intending to reject these generators, even thi
would entitle them to continue to make use of
out plaintiffs' assent until they could procure o
able. It certainly affords no excuse for the fail
notice of rejection.

Not only did defendants so use the generato
the date of the issue of the writ (4th May, 1903
continued that user—from time to time notifyin
of troubles and breakdowns — until March, 19
having obtained other generators, which they h
to order in July, 1903, they removed the generato
tion from their power house. It would appear—
to the contrary disclosed upon the evidence be
that the first intimation to plaintiffs of defenda
tion definitely to reject the generators after thei
lation, was contained in their statement of defenc
on 13th June, 1903. I therefore hold that the
defendants amounted to an acceptance of these
defective though they undoubtedly were, and tha

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r the contract price of them, together with interest
rice of generator No. 1 from 21st September, 1902,
generator No. 2 from 10th November, 1902.

provision in the contract that property should not
il payment in full is a provision inserted solely for
fit of the vendors; it is competent to them to waive
y suing for the contract price they elected to waive
resents no obstacle to recovery: Tufts v. Poness,
51.

rights of defendants as a result of the failure of
s to deliver generators in conformity with their
must now be considered. Acceptance by retention
having consummated their obligation to pay the
price for the generators, the right of the purchas-
ject them, because they did not fulfil the conditions
ontract, and thus escape payment, no longer subsists
nglish law. But this acceptance in no wise inter-
th their right to set up plaintiffs' breach of con-
reduction or extinction of the price claimed in this
nd to counterclaim for any further damage, not too
which they may have sustained: Mondel v. Steel,
W. 858, 870-1; David v. Hedges, L. R. 6 Q. B. 687.
fendants assert both rights, and, in view of the
for set-off which I propose to make, covering the
aims of both plaintiffs and defendants, it is un-
y to distinguish between those elements of damage
defendants might avail themselves by way of de-
d those which would be properly the subject of
laim.

defendants are entitled to a sum equal to the dif-
between the contract price of the generators and
ual value at the dates on which I have found that
e accepted after reconstruction, is quite clear. In
nary case this would probably exhaust their right
ss. But this is not the ordinary case. Such gen-
ould not be procured in the market. They could
replaced by others to be specially manufactured.
t was known to plaintiffs. . . .

apparent that the vendors were made aware of the
urposes for which they were asked to supply these
rs—of the use defendants intended to make of them
the fact that the increased capacity which they

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would afford, if fit to perform the work expected
was essential to the business of defendants. It f
think, that plaintiffs are liable to defendants fo
profits, in respect of all contracts which they actu
caused by inability to fulfil such contracts owing t
downs in the generators due to defective constructi
their incapacity to furnish, under the conditions of
tract, the power output of 2,000 kilowatts. They
be entitled to recover from plaintiffs such sums, i
they may themselves have been obliged to pay as
for breaches of such contracts held by them.

If defendants can prove satisfactorily that th
obliged to refuse or relinquish other contracts wh
might have taken and been able to fulfil had the
rators met the contract requirements, they may als
titled to damages in respect of loss of profits up
contracts.

Defendants should also be allowed such sums
expended by them in repairs of these generators
necessary by breakdowns resulting from excessive
of the armature coils due to defective design or con
of the machines. It is obvious that such repairs
defendants to use the generators, and that such use
to lessen the damages for which plaintiffs might o
be liable.

In respect of all these classes, however, actual
and contracts declined, as well as repairs, the dama
be restricted to losses and outlay up to the time
defendants could by the use of due diligence have
other suitable generators to replace those furn
plaintiffs. The test of 21st September, 1902, ha
monstrated the failure of the generators as recon
allowing a reasonable time for the directors of d
company to consider the report of that test and the
course, and for inquiry about negotiations with
turers, they might, I incline to think, have ordered
generators (which they did order in July, 1903), as
1st December, 1902. It will be for the referee t
mine, upon fuller evidence, at what date they sho
given the order, and what would be a reasonabl
thereafter to allow for the construction of new ge
At the expiration of such period defendants' right
ages must cease.

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rged by Mr. Nesbitt that the clause in the origi-
t by which the vendors undertook to "correct
which may develop in the foregoing apparatus
year from the starting of same," was for the
he vendors, and was intended to enable them,
the generators should fall short of fulfilling the
s of the contract, to alter or reconstruct them
ake them conform thereto, and that under the
on agreement this right was extended so as to
e reconstructed generators and to run for one
the date of the satisfactory test of each of said

it clear that this provision was inserted for the
nefit of the purchasers. Whatever may be said
ced in the original contract, the terms in which
ed to the reconstruction agreement admit of no
its effect when applied to the reconstructed
The year would only run from the date of a sat-
st. No such test was ever made. The clause
ne operative under this agreement. It is pre-
n the assumption that the generators should be
after reconstruction. This clause, in my opin-
intended to and did not in fact qualify or affect
on of plaintiffs to deliver generators designed
cted substantially in accordance with the speci-
d conditions of the contract. It merely entitled
upon such generators being furnished, to the
t of having minor defects, which might develop
repaired during the period of one year.

s, in March, 1904, ofter the generators had been
om defendants' power-house, took them away,
alleged right conferred by the clause with which
now been dealing, and had them reconstructed
ley Co. at their works in Pittsfield, Mass. They
livery of the generators so reconstructed to de-
January, 1905, asserting that they then met all
ts of the contract.

teps plaintiffs, in my opinion, had no right to
assuming that the generators did, when so ten-
espond with the specifications, that tender was
ile and ineffective.

nt for plaintiffs declaring them entitled to re-
ontract price of both generators, with interest

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at 5 per cent. per annum from 21st September, 190
price of one, and from 10th November, 1902, on th
other, and to such sum as upon a reference shall
to be due them upon their claims upon the open
of 8th December, 1897, and the contract of 4th D
1899, in respect of these generators and other go
plied to defendants. Judgment for defendants
counterclaim for damages as prayed, upon the ba
cated above. Reference to senior Judge of Coun
of Wentworth. Plaintiffs to have the general cos
action, other than costs incurred upon and in respe
issue whether the generators in fact conformed to t
fications, and upon and in respect of the issue as to
ficiency and result of the test of 21st September, 19
latter costs together with the costs of the counterc
to be paid by plaintiffs to defendants. Damages a
payable to defendants to be set off pro tanto ag
entire debt and costs payable to plaintiffs. Furth
tions and subsequent costs reserved.

MEREDITH, C.J. MARCH 14t

TRIAL.

BARTRAM v. WAGNER.

*Executor—Action for Account of Documents and
of Testator—Right of Action — Action for Di
Dismissal—Costs.*

Action for an account and delivery over of do
and property.

Plaintiff in person.

E. H. Johnston, London, for defendant.

MEREDITH, C.J.:—Plaintiff is the executor of
band of defendant, and his statement of claim, be
allegation of his executorship and that defendan
widow of the testator, . . . contains only the
paragraph:—

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defendant shortly after death of the deceased deliver to the plaintiff the private papers, per-s, and other property of the deceased in his pos-he time of his death, and which thereby came ssession of the defendant, or to account for the still refuses to do so."

ef claimed is an account of the private papers, ects, and other property of the deceased, which he possession of the defendant, delivery of the plaintiff, and such further and other relief as essary.

y paragraph of the statement of defence neces-referred to is the 7th, which is as follows:—

defendant informed the plaintiff after the death husband that he could have anything to which tled as executor of the said deceased, and the has since been made to the plaintiff since this brought."

ntiff was the only witness examined at the trial. that he had more than once orally and by letter efendant for a statement of the property the tes-eft and his private papers, but that she did not his request. On cross-examination he testified never called at the house of defendant to see en left, that defendant told him there was noth-d that he knew the testator had some pictures ios and jewellery and his wearing apparel.

ar that, if defendant has in her possession any the deceased to which plaintiff is entitled, it is alue, and it is probable that an action for the it or for damages for its conversion, would be proper competence of the Division Court; and it retted, if it be so, that proceedings in the High necessary to enable the plaintiff to obtain his

appear that, notwithstanding the ample power discovery which the High Court possesses since of the Judicature Act, an action for discovery ught: Orr v. Diaper, 4 Ch. D. 92; such actions r. rare, and the practice with regard to them as that which was applicable to a bill for dis-

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covery before the Act. Such a bill was not br
hearing, and on a full answer being given, no f
ceedings could be taken on it, and the defenda
titled to an order for payment of his taxed costs
Discovery, p. 611. If default is made in giving
attachment or sequestration may be resorted to
discovery: ib., p. 619.

The action is not in form or substance an
discovery, and, if it were, no judgment could be p
for the reasons already stated. It is in fact an a
account, and, in my opinion, it is not maintai
fiduciary relationship exists between the parties
existed between the testator and the defendant
of the property in question. The 5 cases in w
for an account would lie in equity are stated
Judgments and Orders, 6th ed., pp. 1358-9, and
of plaintiff is not within any of them.

The action must, therefore, be dismissed, but
jection upon which I proceed might have been r
motion for judgment, or under Con. Rule 261, th
will be without costs.

MARCH 1

C.A.

REX v. MASTER PLUMBERS AND STEAM
CO-OPERATIVE ASSOCIATION, LIMIT
CENTRAL SUPPLY ASSOCIATION OF
LIMITED.

*Criminal Law—Conspiracy — Illegal Trade Con
Criminal Code, sec. 520—Incorporated Compa
Preceding Incorporation—Adoption after Inco
Evidence as to Agreements to Enhance Prices
Competition—Conviction—Appeal.*

Appeal by defendants the Central Supply A
from judgment of CLUTE, J., 7 O. W. R. 213, find
dants guilty upon an indictment for conspiracy c
trade combination under sec. 520 of the Criminal

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penalty of $5,000 upon each of the defendants. neld that the object of the two associations was ery thing that the statute was intended to pre- aat the effect of the combination was unduly to pplying or dealing in the articles or commodities, did restrain and injure trade and commerce in such articles and commodities as defendants ed or sold, and that in fact it did unduly pre- ssen the manufacture and production of such and unreasonably enhanced the price; that o competition in price; that the manufactur- gether and fixed their own prices, they and who would sell their goods; that they met from e and revised their price list, and sold these st what price they pleased, only limited by the utting the price so high that importations might the United States; that there was no pretence t combination, and defendants did prevent and etition in the production, barter and sale, and ng of articles and commodities forming their

eal was heard by MOSS, C.J.O., OSLER, GARROW, MEREDITH, JJ.A.

atson, K.C., and W. W. Denison, for appellants.

rtwright, K.C., and E. E. A. Du Vernet, for the

, J.A.:—The defendants were charged by indict- conspiracy in restraint of trade under sec. 520 inal Code; and at the trial before Clute, J., with- were found guilty and each fined the sum of

endants the Plumbers' Association paid the fine, er defendants, the Supply Association, appealed.

ts are very fully set out in the judgment of eported in 7 O. W. R. 213.

520, as amended by 63 & 64 Vict. ch. 46, reads "Every one is guilty of an indictable offence o a penalty not exceeding four thousand dollars, s than two hundred dollars, or to two years' im- or if a corporation is liable to a penalty not ex-

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ceeding ten thousand dollars and not less than on
dollars, who conspires, combines, agrees, or arr
any other person, or with any railway, steamsl
boat, or transportation company . . . (d) to
vent or lessen competition in the production, m
purchase, barter, sale, transportation, or supply c
article or commodity, or in the price of insurance
son or property."

Counsel for the appellants contended that
language an indictment would not lie against ar
tion but those named in the section, upon the p
the maxim expressio unius est exclusio alterius.
in any event two corporations alone could not b
or in other words, that there must in addition
one natural person as a co-conspirator.

These objections are not, I think, well founde

There are, of course, offences such as assaul
is physically impossible for a corporation to comm
such offences as they can commit, whether of r
or malfeasance, and for which the prescribed p
is one which they can be made to endure, they ar
able to the criminal law as are natural persons:
Great Northern of England R. W. Co., 9 Q. B. 3
Tyler, [1891] 2 Q. B. 588-594; Pharmaceutical
L. & P. Supply Association, 5 App. Cas. 857.

The section in question expressly provides fo
ishment of a corporation by fine, and this seem
them on the same plane for all purposes under
as natural persons. See also the interpretation
the Code, sec. 3, sub-sec. 5 (T), and the genera
tation Act, R. S. C. ch. 1, sec. 47, sub-sec. 22.

As to the remainder of the objection, any c
course created by the naming of the transport
panies at the end of clause 1. Why this was
necessary does not clearly appear, but I am wh
to regard their presence in the section as having
reaching and controlling effect as to exclude from
tion all other commercial corporations.

The section begins, "Every one" is guilty, etc.
to the punishment first prescribed, and then pro
if a corporation," to the punishment secondly

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onspires," etc., with any other person, "or with any . . . company," etc.

clause evidently assumes and provides for the case nspiracy between any natural person and a trans- n company, and also between any corporation and a tation company, whether incorporated or not. And once appears to render inapplicable the maxim upon he contention rests.

common knowledge that the majority of large opera- manufacturing and dealing in the articles and com- of commerce are now carried on by joint stock es. Can it be imputed to the legislature that the n in preparing the net was to catch only the small urely not. Then again the section expressly ex- prevent combinations in, among other things, in- both life and fire. These subject matters, it is also knowledge, are always carried on by joint stock or companies or corporations. Insurance corporations expressly named at all, and therefore unless in- n the term "corporation," found in the first clause ection, could not under the construction contended ither prosecuted or punished.

Watson also argued that evidence had been impro- mitted against his clients, his objection being ap- twofold: (1) that evidence of the acts of the lumbers was not admissible as against his clients; that evidence of the acts and conduct of the parties the incorporation of the Supply Association should been received.

he further contended, his main contention I think e called, that in any event no evidence had been any corporate act on the part of the appellants ir incorporation.

nspiracy is generally matter of inference deduced tain criminal acts of the parties accused done in e of an apparent criminal purpose in common be- em:" per Grose, J., in Rex v. Brissac, 4 East 171, vith approval in Mulcahey v. The Queen, L. R. 3 5, at p. 317. See also Regina v. Fellowes, 19 U. C. , 58; Regina v. Connolly, 25 O. R. 151.

it was quite proper and indeed necessary to give evidence of the nature of the conspiracy, to shew

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how it affected trade. The appellants controlle
ply of materials with which the business of plu
carried on. And the other association, consist
master plumbers using this material, dealt di
the customers who are said to have been injurious
And it was therefore the acts and conduct of th
sociation and its members which, on the theory
acy, directly made the unlawful object attainable
the public.

And it is well settled that evidence of the
the conspiracy alleged may be given before th
criminal agreement is proved: see Rex v. Hamm
718; Rex v. Brittain, 3 Cox C. C. 76.

The remaining objections above stated are
directed to this, that however criminal the con
parties had been in the past, the appellants upon
tion began with a clean sheet, and could only be
with the criminal agreement by some distinct
corporate act. And, in the paucity of evidence
sequent to incorporation, the objection, it may b
is formidable. I have, however, after careful an
consideration, come to the conclusion that the
ferences were drawn by the learned Judge at the

The theory of the Crown, apparently concurre
Judge, is that prior to the incorporation there ha
a criminal agreement, first between the indivi
prising both associations before the incorporat
Plumbers' Association in April, 1905, continued
incorporation by the defendants the Plumbers'
down to the incorporation in September, 19
defendants the Supply Association, and aft
the end between the two incorporated bo
there was at one time such an agreement i
puted. The defendants the Plumbers' Associ
incorporated as a co-operative association
provisions of R. S. O. 1897 ch. 202; the other
under R. S. O. 1897 ch. 211. Each association
poration took over the assets, obligations, and p
previously incorporated association. The secre
incorporated body, really its manager, was in
retained in office by the incorporated body. A
tinued in use the same books as those in use b
poration. The large majority of the individu

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corporated associations in each case continued their on with the incorporated bodies. And the mode of nent was in no material respect changed in either r incorporation.

evidence shews that the appellants sought incorpor- the belief as advised that they could with safety do things as an incorporated body which they could without too much risk while unincorporated, no fear inspired by the circumstances of the Crash- tment then pending against one of the members, he then threatening trouble with the Customs De- at Ottawa. And it is a perfectly fair inference that gs which it was desired to do, and which indeed lly the only things intended or proposed to be done, se connected with the continuance of the under- , or at least of some understanding with the master , whereby competition was to be kept down and be kept up, at least to the very verge of the law. satisfactory reason is suggested for the appellants' ation, nor indeed for its existence as an incorporated orporated body. They did not manufacture or sell s themselves, nor carry on or propose to carry on r business. No difficulty was or can be suggested ndividual master plumbers going to the individual turer or jobber directly for his supplies. But there e than a suspicious origin. There was proved joint nuous action towards the same purpose down to the ncorporation. In July, 1905, the secretary of the Association interviewed a Mr. Reeve who had been er of the Master Plumbers' Association, but had n, and was being punished accordingly, with a view ing him to return to the fold. And in the same joint deputation from both bodies proceeded to o interview the Minister of Customs with reference harge which had been made against them of refus- lies to others than members of the Master Plumb- ciation.

diately before that there had been friction between bodies because the Supply Association had passed a n, under pressure, as it stated, from the Minister of providing that in future they would sell to all umbers having established places of business. Why on, and why the necessity for the resolution at all,

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if there had been no previous understanding of t
question?

But after the return from Ottawa no more i
the resolution, and no customer was produced, n
any reliable evidence to prove that any change
been effected by or after the resolution. Then
committee, a necessary part of the machinery, co
sit as usual down to and after the appellants' inc
just as before. And in the month of September,
after the appellants' incorporation, the secretary
pellants is found complaining to Mr. Mann that
keeping to the agreement not to sell to those no
of the Plumbers' Association. And finally there
one distinct instance proved of a master plumb
been refused supplies after the appellants' inc
by a member of the appellants' association.

Then, there is the unquestioned circumstanc
soon as the appellants' incorporation took place,
of both bodies met by previous arrangement, and
aid of experienced solicitors, proceeded to settle
of a written agreement which outwardly at leas
posed to regulate the future relations of these
ordinary bodies. And in this agreement, as fina
although not actually executed, the same idea o
the outside master plumber continues, for it is e
his trade was not to be cultivated. He was to
aged as much as possible. For instance, he was
entitled to the benefit of the price lists agreed up
trade of the more fortunate members, but might
any price which pleased the supply men. The n
the association were to receive a discount of 7½
on all their purchases. The outsider had no
And what is still more strange, the supply me
addition to pay 5 per cent. upon all sales made to
to a fund controlled by the parties. And it is
sume that this 5 per cent. was also intended to c
the pocket of the unfortunate outsider.

With reference to the objection that no expres
act was proved, it is proper to observe that the o
a criminal nature, and concerns the conduct of
Such conduct could only be proved by proving
who apparently represented it did. It would h
good answer to prove that the acts relied on

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l or had been disavowed. But, on the contrary, it apparent that the incorporated body existed solely doing of exactly such and similar acts, that it had no other business, and that but for its connection, or unlawful, with the Master Plumbers' Association, no reasonable excuse for existing at all.

ler these circumstances, with such a history and and apparent purpose, the acts to which I have re- as occurring after incorporation, although compara- rifling, were and are, I think, sufficient to uphold the Judge's conclusions against the appellants, and the should therefore, in my opinion, be dismissed and viction affirmed.

s, C.J.O., gave reasons in writing for the same con-

LAREN, J.A., concurred.

ER and MEREDITH, JJ.A., dissented, for reasons y each in writing.

MARCH 14TH, 1907.

C.A.

REX v. BRINLEY.

l Law—Bigamy—Indictment for—Defence—Divorce Foreign Court—British Subjects—Ontario Domicil— lidity of Divorce—Bona Fide Belief in Validity of rce not a Defence — Constitutional Law—Criminal . sec. 275, sub-sec. 1 (a)—Intra Vires.

reserved by the junior Judge of the County Court on, sitting in the County Court Judge's Criminal that county, under the provisions of part LIV. of inal Code.

ndant was charged with the offence of bigamy un- 275, sub-sec. 4, of the Criminal Code. He was and ad been a British subject, and was married to one

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Rosa Card in the county of Huron on 14th Ap
In August, 1903, his wife left him, and went to
the State of Michigan, U.S. She then intended t
from her husband, had no intention of ever ret
Canada, and thenceforth made her home in the
Michigan.

In January, 1906, she obtained a decree of div
defendant in the Circuit Court for Wayne county,
on the ground stated in the decree of "extreme
Defendant was not served with any notice of the di
ceedings, and took no part therein.

In April, 1906, defendant went with one Emily
Picot to Detroit, in the State of Michigan, and t
through a form of marriage with her before an of
qualified according to the laws of that State to pe
marriage ceremony. He left Canada with inte
through the form of marriage with her, and im
afterwards returned with her to his residence in the
of Goderich, in the county of Huron, Ontario. E
taining his marriage license in Goderich, he had i
session a copy of the decree of divorce, and he ha
tained legal advice that the decree was legal and bin
that he was at liberty to marry again if he saw fit.

On these facts the County Court Judge found
guilty of the offence charged, but reserved for the
tion of the Court of Appeal the following questio

1. Is the said decree of divorce granted by th
Court of the State of Michigan upon 15th January
valid and binding divorce and of any effect in the
of Ontario, and does it effect a valid dissolution of
riage so as to constitute in law a good defence t
dictment?

2. Was the element of intent or mens rea remov
fact of the defendant knowing that the decree of di
been granted and his having been advised that
legally marry again?

After the case thus submitted had been argued
standing for judgment, the Judge reserved the
further question:—

Is paragraph (a) of sub-sec. 1 of sec. 275 of the
Code, 1892, intra vires the Parliament of Canada,
the limitation imposed by sub-sec. 4 the effect of so

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ph (a) as to bring the substantive enactment con-
n paragraph (a) within the powers of the Parliament
da?

case was heard by MOSS, C.J.O., OSLER, GARROW,
EN, MEREDITH, JJ.A.

Proudfoot, K.C., for defendant.

R. Cartwright, K.C., for the Attorneys-General for
and Ontario.

ER, J.A.:—As regards the last question, I think it
cessary to say (1) that, so far as this Court is con-
we ought to consider it as disposed of by the judg-
opinion of the Supreme Court of Canada upon the
int which was submitted for their determination in
riminal Code, Bigamy Sections, 27 S. C. R. 461. It
re held that these provisions were intra vires the
ent of Canada. (2) If reasons for that conclusion
e sought for and adduced, they are well set forth and
led in the judgment of the Chancellor in Regina v.
14 O. R. 525. The later case of Macleod v. Attor-
eral for New South Wales, [1891] A. C. 455, was
upon a state of facts different in at least one im-
respect from those in the present case, and upon a
more extensive in its scope than our own, not being
to British subjects resident in the colony. It there-
s not affect the reasoning upon which the judgments
Supreme Court and the Chancellor proceeded.

question must, therefore, in my opinion, be answered
ffirmative.

regards the first question in the case firstly submit-

endant relies upon the Michigan divorce obtained at
ance of his wife as an answer to the indictment, on
nd that it effected a valid dissolution of his marriage
r. But that marriage having been solemnized in Can-
l defendant having been at the time and always after-
British subject resident and domiciled there, and
aving appeared to and having taken no part in the
ings in the Michigan Court, I do not see how that
ver acquired jurisdiction to dissolve it.

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In Lemesurier v. Lemesurier, [1895] A. C. 5
held by the Judicial Committee of the Privy Cou
a full review of the authorities, that according to t
ples of international law as administered in our C
domicil for the time being of the married pair a
only true test of jurisdiction to dissolve the marri
decision in the case, which is of general applic
more fully stated in the head-note, is that "the
domicil of the spouses within the territory is ne
give to the Court jurisdiction so to divorce a vincu
its decree to that effect shall by the general law
possess extra-territorial authority. A so-called m
domicil said to be created by a bona fide residen
spouses within the territory, of a less degree of pe
than is required to fix their true domicil, cannot
nized as creating such jurisdiction."

We followed this decision in the recent case
Woods, 6 O. L. R. 41, 2 O. W. R. 338.

In the present case, it is true, the wife, thoug
and domiciled in Canada at the time of her mar
become a permanent resident of the foreign state
brought her action for divorce there. But this, acc
the Lemesurier case, could make no difference if th
was not domiciled in that state: Green v. Green,
89, where Gorrell Barnes, J., says he finds "no case
it has ever been decided that a man can be divorced
wife by the laws of the country in which he has n
resident or domiciled:" Harvey v. Fernie, 6 P. D. 3
Cas. 43, 46; and see Bater v. Bater, [1906] P. 2
on The Conflict of Laws (1896), pp. 127, 163, 169,
there cited; Westlake on Private International Law
pp. 82, 86.

Mr. Proudfoot cited the recent case of Armita
torney-General, Gillig v. Gillig, [1906] P. 135, in
was held that the Courts of this country would rec
binding effect of a decree of divorce obtained in a st
the husband was not domiciled, if the Courts of th
or state of his domicil would recognize it. . . .

There is nothing in this case inconsistent with
sion in the Lemesurier case, but the contrary. T
regarded the law of the state of the domicil—the
New York—as that which affected and determined

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usband, and, as that law recognized the validity of
h Dakota decree, the wife who obtained it was free
again. The defendant is thus still left to demon-
he can, that the law of his Canadian domicil will
the validity of the Michigan decree. This, how-
I have said, is, according to that law, denied. And
itage v. Armitage, [1898] P. 178, where Gorrell
J., refers to the American doctrine that the wife
uire a domicil of her own in the country of the
nial home. Here the wife had not acquired even
omicil, as the State of Michigan had never become
imonial home of the parties.

v. Bater, [1906] P. 209, follows and applies Leme-
Lemesurier, holding that the domicil for the time
the married pair, when the question of divorce
fords the only true test of jurisdiction to dissolve the
, and that the Court of the bona fide existing domi-
urisdiction over persons originally domiciled in an-
untry to undo a marriage solemnized in that other
See also Guest v. Guest, 3 O. R. 344, 570; Magurn
rn, 11 A. R. 178; The Trial of Earl Russell, [1901]
6.

eed not consider the recent case of Haddock v. Had-
6 U. S. R. 562. It has been severely criticized both
nited States and in England, but it is not necessary
e it to shew the invalidity of the Michigan decree.

s like Ogden v. Ogden, 23 Times L. R. 158, shew
Courts of the husband's domicil cannot undo a mar-
emnized in England between, e.g., a domiciled French-
l an Englishwoman, in accordance with the require-
f English law, merely because it would be irregular
ountry of the domicil by reason of the omission of
ndition, such as the consent of the parents in the
minor, required by the laws of that country. . . .

erence to Stevens v. Fisk (1885), Cameron's Canada
Court Cases, p. 392.]

first question submitted by the stated case must, there-
answered in the negative.

question whether the fact of defendant knowing that
ee of divorce had been granted and his having been
that he could legally marry again, would be a de-
the ground that an absence of guilty intent or

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mens rea was thereby established, must also up
thorities be answered in the negative.

In the recent case of Sherras v. De Rutzen, [
B. 918, Wright J., speaking of the presumption th
ledge of the wrongfulness of the act is an ingredie
offence, says: "That presumption is liable to b
either by the words of the statute creating the of
the subject matter with which it deals, and bot
considered: Nicholls v. Hales, L. R. 8 C. P. 32
the most remarkable exceptions was in the case
It was held by all the Judges, on the statute of 1
11, that a man was rightly convicted of bigam
married after an invalid Scotch decree which ha
tained in good faith and the validity of which
reason to doubt: Lolly's Case, Russ. & Ry. 237."
tum in that case that no sentence or Act of a
country can dissolve an English marriage a vinc
monii, for grounds on which it is not liable to be
vinculo matrimonii in England, was afterwards o
Harvey v. Fernie, 6 P. D. 35, 44, but in other r
decision is not affected.

Then the Criminal Code, sec. 275, after defini
the offence of bigamy consists, declares, sub-sec. 3
one commits bigamy by going through a form o
(inter alia), (a) if he or she in good faith and on
grounds believes his wife or her husband to be dead
he or she has been divorced from the bond of the
riage."

Sub-section 3 (a) adopts the law as laid do
Court for Crown Cases Reserved in The Queen v.
Q. B. D. 168; but sub-sec. 3 (c) contains no ex
favour of a person who bona fide believes, or is ad
the bond of marriage has been dissolved by a di
this, with the express enactment as to what the act
consists in, is strong to shew that no such exceptio
implied, and that a valid divorce must be proved
cused. That may well have been intended on
public policy to prevent persons from setting up
while you wait," which to common knowledge ar
obtained in some of the Courts of the neighbourin

In some of these Courts the authorities on t
seem to be in conflict: Am. & Eng. Encyc. of La

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. 41. In Wharton's Criminal Law, sec. 88, p. 1695 is said "that the defendant honestly believed in the e of a non-existent divorce is no defence."

conviction must be affirmed.

LAREN and MEREDITH, JJ.A., each gave reasons in for the same conclusion.

s, C.J.O., and GARROW, J.A., also concurred.

MARCH 14TH, 1907.

C. A.

MILTON TERMINAL R. W. CO. AND WHIPPLE.

Private Way—Closing up — Plan — Amendments— tion to County Court Judge — Evidence—Affidavits— e of Petitioners—Registry Act, R. S. O. 1897 ch. 136. 110—Construction of—Substituted Way.

eal by Laura Whipple from order of junior Judge of Court of Wentworth, under sec. 110 of the Registry S. O. 1897 ch. 136, amending a plan of lands in the Hamilton laid out into lots by the late George Hamil- R. J. Hamilton, filed in the registry office for the closing up a lane or alleyway shewn on the plan, and another in lieu thereof. The order was made on lication of the railway company. The appellant was er of premises forming part of two lots laid out and n the plan and abutting on the rear on the lane or supposed to be closed.

ynch-Staunton, K.C., for the appellant.

H. Blake, K.C., for the company.

judgment of the Court (Moss, C.J.O., GARROW and EN, JJ.A.), was delivered by

s, C.J.O.:—The proceedings in the matter illustrate ongly the propriety of adhering to the sound principle

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that as a general rule upon applications under sec.
Registry Act, the evidence should be given viva vo
in the form of affidavits: see Re McDonald an
Listowel, 6 O. L. R. 556, 2 O. W. R. 1000.

The application was launched, supported, and o
affidavits, apparently without objection from an
with the result that the Judge deemed the evidenc
in this way so unsatisfactory as to call for a perso
tion, which he appears to have made of his own r

The information supplied by the affidavits is o
meagre character. The title of the applicants is s
very vague and general way. The whole stateme
they "have completed negotiations for all the prope
on plan hereto annexed, and which is exhibit 'A' t
davit." No title deeds are produced, not even an
or agreements for the purchase of the lands spoken
is no attempt to trace the title of those persons
lands the applicants have "negotiated," and to
they were the persons by whom the plan was mad
or their assigns. There is nothing to shew in wha
the lane shewn on the plan made and filed by or f
and R. J. Hamilton was dealt with in the conveyan
lots shewn by the plan to abut on the lane. It ma
the conveyances merely granted the lots by their n
cording to the plan, or it may be that they gave a
right of way over the lane to each grantee whose lo
on it in common with the grantees of the other lot
may have described such lots by reference to the la
rear. But all this is left to conjecture. These th
have been admitted or may have been well know
parties concerned. Certainly, throughout, much
have been taken for granted. There is, however, n
shew that the original proprietors parted in any
the fee in the soil of the lane or alleyway.

The affidavits filed on behalf of the present ap
opposition to the application. render no help in
spects. Her title deeds are not produced, nor are
in respect of the lane set forth with precision. A
shewn is that her dwelling stands on parts of lots
shewn on the plan, and that in the rear they abu
lane in question.

The plan on file in the registry office was not pr
any copy of it verified. The nearest approach to

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rint sworn to be a copy of a plan of a block of land by King, Main, Catherine, and Walnut streets, but pears on it another later survey and plan of the land st of lots numbers 1 and 32 as shewn in the George J. Hamilton survey and plan. Whether the later of a portion of that formerly in the Hamilton plan appear, but from present appearances it seems to be not covered by the earlier plan. Altogether it may said that seldom have the materials presented in a ich is not interlocutory on its character, furnished t on the question in issue or been more unsatisfactory character.

it was for the applicants to make out a case, and there us difficulties in the way.

rding to the George and R. J. Hamilton plan, which to have been filed in the registry office in August, ere were two tiers of lots, one comprising lots num-2, 3, and 4, fronting on King street, the other com-lots numbers 29, 30, 31, and 32 fronting on Main In the rear of these two tiers of lots was a lane or 12 feet wide, which commenced at or within a few f the line of the eastern boundaries of lots numbers 2, and ran thence westward to Catherine street on side of the lots comprised in the plan. Presumably re made according to the plan. The lane or alley-been used in connection with the lots for many Mrs. Whipple's property forms part of lots 31 and the lane or alleyway runs immediately in the rear of nises. No doubt, she and her predecessors in title de constant use of it as a means of access to and from of her property.

t is sought is to close this lane or alleyway from e street to a point about 18 feet to the west of the line of Mrs. Whipple's property, and to open a new feet wide alongside the western line of her property nding south from the southern line of the present Main street.

first difficulty in the way is as to the title to the land ng the lane or alleyway proposed to be closed. It is that, unless the applicants have acquired the title to of the lane or alleyway, they are not in a position to

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ask that it be closed, and the land thus throw
adjoining parcels. There is nothing proving, no
fairly gathered or presumed from what does appe
title to the soil of the lane or alleyway is not out
the heirs or devisees of George and R. J. Hami
tainly there is nothing to shew that it has been
or is vested in the applicants. And it seems to
sary precedent to an amendment or alteration of
volving the closing of a lane appearing upon it, t
the applicant is the original owner, or that he h
his title in the soil of the lane. Without this h
a position, as regards the essential matter to be
the proposed alteration, to claim to be the perso
the plan was filed or his assign.

It is not the intention of the section that the
divest a title to part of the land at the instance c
of other parts of the land dealt with by the plan.
guage of the section seems to plainly denote ow
the person applying of the part whereupon the pro
ation or amendment is to be made.

It is not necessary—as was argued for Mrs.
that the applicants should have acquired or got
of all the owners of lots or parcels shewn by the
words of the section do not support such a constr

What is said is that in no case shall a plan
although filed and registered, be binding . .
sale has been made according to it. This is follo
proviso that in all cases, i.e., either before or aft
sales, amendments may be ordered at the instance
son filing or registering the plan or survey or
. . . if upon hearing all parties concerned it
fit and just to so order. The meaning is that, v
of a part has been made, the plan or survey becon
on the person filing or registering it, but not
He is at liberty, notwithstanding the sale, to appl
if he can make a proper case, to obtain, an al
amendment. The person to whom the sale has
is a party concerned entitled to notice of and to
application. And, as the person filing or regis
apply, so may any purchaser from him or any o
through such purchaser. But, if he seeks to cl
the soil of which has not been departed with by

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r registering the plan or survey, he cannot obtain the
e seeks unless he represents the title of that person.

s appears to be the proper deduction from the au-
s.

n re Chisholm and Oakville, 15 A. R. 225, Osler, J.A.,
red that the applicant was a person who had filed or
ed the plan. In In re McIlmurray and Jenkins, 22
98, the applicant Jenkins was one of the persons who
d or registered the plan. In In re Waldie and Vil-
Burlington, 13 A. R. 104, and in In re McDonald
wn of Listowel (supra), the applicants had procured
ne persons by whom the plans or surveys had been
ed, the title to the soil in the streets or lanes sought
losed. In In re Ontario Silver Co. and Bartle, 1 O.
40, the report does not state the fact, but a reference
ecord shews that it was proved that the Niagara Falls
ool Lands Company, by whom the plan was filed or
ed, afterwards sold and conveyed to the Ontario Silver
ny the entire property, by metes and bounds, in-
the way in question.

he present case there can be no pretence upon the evi-
hat the corporation of the city of Hamilton has any
interest in the soil of the lane or alleyway in ques-
It is a private way, and has never been assumed or ac-
by the municipality. The applicants cannot, there-
e aided by the consent of the municipality, even if
d, a fact which was contested on the argument.

the ground, therefore, that the applicants have failed
themselves in a position to obtain the closing of the
question, the application should not have been granted.

t were necessary to enter upon the merits, there would
ulty in upholding the order on the material before the

s stated in the affidavits filed on behalf of the appli-
hat the corporation of the city of Hamilton has en-
to an agreement with the applicants, by which they
nitted to lay tracks in and around the property and
ect tracks on the property with tracks on the streets
g it. And this statement appears to have materi-
luenced the judgment of the Judge. He remarks

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that "if the Terminal station should be erecte
necessary car tracks within it should cross the al
at present, the situation would be extremely da
those using the alley, and this dangerous conditi
avoided by the proposed alteration."

But, unless the applicants have the right to p
on or across the alley, that which is apprehended
done. The municipality are not in a position to
leave to use the lane or alleyway, and they have no
to do so.

A state of circumstances may arise in which i
proper to say that the lane or alleyway should be
withstanding the opposition of Mrs. Whipple. B
sidering such an application, it would not be u
to take into account the manifest difference in
and comfort to her that a change such as is pr
entail. At present she has access to and from
her premises by a lane, the use of and traffic upon
convenient and free from all disturbance to he
and the comfort of those living in it.

The lane proposed to be substituted will, as
tance is concerned, be quite as, if not more, conv
it is plain that the traffic brought down it in close
to her dwelling cannot but be disagreeable and a
the indwellers.

While it may be that persons residing in large
expect to be subjected to inconveniences to which
resident is not exposed, yet they should not be
suffer them if there are ways by which they may
ably prevented or avoided. And such ways seem
applicants in the present case.

But at present it is not necessary to say more
the appeal must be allowed.

If the applicants desire it, the order may be e
be without prejudice to a future application.

The appellant is entitled to her costs here and

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MARCH 14TH, 1907.

C. A.

SIMS v. GRAND TRUNK R. W. CO.

y—Injury to Person Crossing Track — Negligence—tutory Signals—Excessive Speed—Findings of Jury—ntributory Negligence—Failure to Look for Approach- Train—Dangerous Crossing—Evidence — Previous cident — Inflammatory Address to Jury—Absence of ejudice.

peal by defendants from judgment of MAGEE, J., upon dings of a jury at the second trial, in favour of plain- or the recovery of $1,500 damages. Plaintiff Alex- Sims, an infant, was injured on 23rd July, 1903, by struck by the engine of a train of defendants while on le crossing their tracks at the Bloor street crossing in y of Toronto. Had he looked, he could have seen the ch of the train, but he did not look. There was some ce that the usual statutory signals of the approach of in were not given. The infant plaintiff sought to re- damages for his injuries, and the adult plaintiff, the s father, claimed damages for loss and expense in- by him in consequence of the injuries. The Court of , after the first trial, held (12 O. L. R. 39, 7 O. W.), affirming the decision of Street, J. (10 O. L. R. O. W. R. 664), that the case could not have been wn from the jury; but that the findings of the jury posed to the great weight of evidence, and the $300 s recovered by the father (the infant recovering excessive; and therefore directed a new trial. At nd trial the jury awarded the infant $1,200 and the $300.

appeal was heard by MOSS, C.J.O., OSLER, GARROW, EN, and MEREDITH, JJ.A.

Nesbitt, K.C., and D. L. McCarthy, for defendants.

MacGregor, for plaintiffs.

ROW, J.A.:— . . . No complaint is now made as nount of the damages.

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What is substantially complained of is that e
a former injury to one Moore at the same crossin
properly admitted, and that the address of the c
the plaintiffs was of an unduly inflammatory nat
new trial is asked.

There were also objections of a more general na
as that the infant plaintiff was the author of his
fortune, that he was guilty of contributory negli
that the verdict was against the weight of evidenc
indeed perverse.

But as to these last mentioned objections, w
think, regard the findings of the jury as conclusiv

The chief contest was, of course, as to whether
statutory signals had been given. There was, it
considerable body of evidence in favour of the a
but there was also the evidence of the infant plain
Prince to the contrary. And in the conflict it w
jury to say which side was to be believed. There
tainly some circumstances which, if believed, might
be regarded as detracting somewhat from some of th
advanced by the defendants. For instance, the wi
who, approaching the crossing from the east, saw t
Pratt approaching from the west "away in the di
he says in cross-examination, having said in his
amination, "about a block away" from him. Da
he saw the train before he crossed. He stood at
yards after he had crossed, while Pratt says he w
about 60 yards west from the crossing. Betw
Pratt stood and the track along which the train w
there were Dougan's house and the greenhouse, tr
etc., obstructing to some extent the view, and yet
most positive of all the witnesses called for the d
posed that he saw the train approaching from wh
at 70 yards from the track, when a quarter of a m
track, and heard the whistle blown at or about th
post, and also heard the bell sounded immediately
whistling. This was, of course, very positive evi
if it was the fact, of which there was some evidence,
where he was he could not see the train at all,
continuously, because of the intervening obstruction
might fairly infer that his other evidence was no
pended upon. Then there was also the circums
Day, who had just crossed the track going westerl

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ain, who must have been upon the alert and who was
ter position to see and in at least as good to hear,
even asked if he heard the signals, while the witness
n, who was with Day, said that he only heard the
istles immediately before the accident, although he
e bell ringing before that, but how far back he could
although he thought it was as far back as it could be
And the witnesses Weekes and Miss Godkin, also
y the defendants, who were standing west of the
out midway between Day and Pratt, were also not
out the signals. They, too, could have heard at least
as Pratt, and were also in a better position to see.
these witnesses seemed in any way adverse to the
ts, but all gave their evidence seemingly with per-
ness and without bias. Then there were other tracks
the same street, upon which other trains were fre-
passing, not far distant, where also there would be
and bell ringing. These were to the west, from the
in which Pratt was coming and to which he was
est, of all the witnesses called, and it was not a wholly
able inference, if he heard what the others did not,
whistles and bell ringing which he said he heard,
on the tracks behind him and not upon those in

e was, of course, in addition to Pratt's evidence, the
of the train men, 5 in number, all in favour of the
ts' contention, although the conductor and the rear
an did not, because of the distance, hear the bell.
evidence must always, from the very nature of the
the subject of a not unnatural suspicion. I am
from saying that the suspicion is well founded,
in men are less likely to be manly and to tell the
en upon pain of dismissal, than are other men; my
erience would be quite to the contrary, but the cir-
ces cannot be ignored so long as the law permits
be the judges of the facts. It is for them and not
Judge to say which side is, under all the circum-
to be believed, if there is any reasonable evidence
s.

is case they have seen fit to believe the plaintiff's
er than the defendants'. The former jury came to
conclusion. And, whatever my own opinion may be,
impossible to say that this conclusion is such that

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no 12 honest men might not upon the whole evi
reached it. And if the statutory signals were
there was at once evidence of negligence on the
defendants, and the remaining question of the
own conduct contributing to the result was also f

With reference to the Moore accident, this is
place: Mr. Fox, the engineer, was under cross-e
by Mr. MacGregor, counsel for the plaintiffs:
Gregor: Q. Have you ever had any accident the
A. Never had. Q. Did you know of any acciden
fore? A. I could not say. Mr. McCarthy: Is thi
His Lordship: Yes, it would go to shew the ne
care on his mind. Mr. MacGregor: Q. Do you r
man called Moore—that was only about 4 mon
at this place? Mr. McCarthy: That is most impr
Lordship: I will allow the question just in that
McCarthy: It was ruled out at the last trial.
Gregor: Did you hear of a man named Moore
killed about 4 months before that at the same
No, I didn't. I cannot remember."

Then Mr. Robbins, one of the brakesmen,
cross-examination, was asked: "Mr. MacGregor
you have heard of a great many accidents of thi
A great many accidents—yes. Q. Did you ever
other accident at this particular place? A. N
heard. Q. Before this accident—about 4 mon
Did you ever hear of one? Mr. McCarthy: Th
the limit. He asked the man and he said he had
His Lordship: It is quite right, what he has heard
MacGregor: Q. About 4 months before this, a
crossing, did you hear of a man named Moore
at this point? No answer. Q. Had you heard
happening of this accident that 4 months before
man killed, named Moore, on that very crossing
Mr. McCarthy: There is no evidence on this
Lordship: No, there is no evidence. Mr. MacG
my learned friend would allow me I would prove
Lordship: It is only the point whether this wi
of anything that would call for caution upon his
McCarthy: These questions were ruled out bef
Judge who tried this case, and I think properly
and I do not think your Lordship should allow
put. His Lordship: I allowed him to ask whet

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an accident 4 months before this accident. Mr.
: My learned friend got his own evidence in by
the gentlemen heard of a man named Moore being

nly issue upon the pleadings was that the defend-
been guilty of negligence causing injury to the
and the particulars of such negligence given,
excessive speed of the train which struck the infant
and (2) failure to give the statutory warnings when
ng the crossing.

being so, it is not easy to see the relevancy of the
is a fact, that a man called Moore had 4 months
en injured at the same crossing. The defendants
ht to cross the highway. They were in doing so
course, to conform to the provisions of the statute
ed and warnings. No case was presented of nuis-
he highway, or of a crossing so highly dangerous
ial or extraordinary precautions in addition to
scribed by statute were necessary. Nor is it at all
ase of a machine alleged to be dangerous, nor of a
g or other dangerous animal. The plaintiffs were
prove the acts, or one of them, of negligence al-
, excessive speed or absence of warnings, on the
of the infant plaintiff's injury, and neither would
proved or aided in proof by proving that Moore
ed, even under similar circumstances, 4 months
For such accidents railway companies are usually
ay; and by the method proposed might very likely
to pay twice. And, notwithstanding the latitude
n cross-examination, a purely collateral fact such
n no more be proved then than upon the examina-
ief, unless it falls within the well known excep-
he rule, such as that it bears upon the memory or
the witness, which is always, of course, pertinent,
for which this evidence was not even offered. See
v. Goodwin Brothers, W. N. 1887 at p. 107, per

ipson on Evidence, 3rd ed., at p. 129, it is said:
dition of a place or thing may sometimes be proved
g its condition at other times. Thus in actions
nce to shew that a particular spot was dangerous,
accidents there may be proved." And reference is

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made to Moore v. Ransome, 14 Times L. R. 539, and
v. Eastern and M. R. Co., 22 Q. B. D. 391. It shou
ever, be noted, although the quotation has no pa
application to this case, that the cause of action in
these cases was nuisance, and not trespass, and there
which a different rule applies, in the former in mai
a public dock in a dangerous condition, and in the
in placing a heap of dirt and refuse near a highwa
also Roe v. Lucknow, 21 A. R. 1.

And, although in the result no actual evidence
Moore accident was given, except, perhaps, in the q
of counsel, I would be disposed, as there was a jury
gard even the attempt, especially in the form in
was made, as of sufficient importance to warrant a n
if it appeared that the defendants had been prejudic
that, having regard to the course of this litigati
especially to the very moderate and reduced
awarded by the last jury, I am quite unable to see.

And I am also of the opinion that the speech
plaintiff's counsel exceeded in several particulars the
of fair and reasonable comment, but I am not at all
that to obtain the benefit of the objection the def
counsel was not obliged to do more than he did.
jected, it is true, but he should also, I think, hav
for a ruling from the Judge; if that had been done t
could, and no doubt would, have been corrected on t
see Sornberger v. Canadian Pacific R. W. Co., 24 A.

But, in any event, the same remarks apply to th
the objection lastly above considered; no prejudice
defendants appears to have resulted, under all the
stances: see Praed v. Graham, 24 Q. B. D. 53-55.

So that, upon the whole, I think the appeal fails a
be dismissed with costs.

OSLER, J.A., gave reasons in writing for the sa
clusion.

MOSS, C.J.O., MACLAREN and MEREDITH, JJ.
curred.

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MARCH 14TH, 1907.

C.A.

IA v. CANADIAN PACIFIC R. W. CO.

Injury to Section Foreman—Death—Action by nder Fatal Accidents Act and Workmen's Com- Act—Collision of Trains—Negligence of En- er—Disobedience of Rules—Contributory Negli- Deceased — Want of Proper Equipment — Find- ury—Liability at Common Law—Liability under 's Compensation Act—Damages—Payment into th Defence—Costs.

y defendants from judgment of CLUTE, J., at favour of plaintiff, upon the answers of the tions submitted to them.

on was brought by Sarah Louise Muma, the dministratrix of Samuel Edward Muma, on be- elf and 5 infant children, to recover damages h of her late husband while in the defendants' ng to a collision between a gravel or extra work vas called, and an extra pile driver train, on a efendants' railway.

ackstock, K.C., and Angus MacMurchy, for de-

arley, K.C., and E. Sweet, Brantford, for plain-

ment of the Court (MOSS, C.J.O., GARROW, J.A., J.A.), was delivered by

.J.O.:—The claim was laid as at common law atal Injuries Act, and also under the Workmen's n for Injuries Act.

defence defendants, besides denying the allega- statement of claim, set up that if the deceased ries and died under the circumstances set forth ment of claim, the collision was caused by the f a fellow-servant. In the alternative they set collision happened by reason of the negligence

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of some person or persons in the employ of de
had charge of or control of locomotive engin
upon defendants' railway, and that their liabi
tiff was limited to the sum of $2,102.03, that
lent to the estimated earnings during three ye
the injury of a person in the same grade emp
that period in a line employment, and they alle
had always been ready and willing to pay that s
brought that sum into Court in full satisf
action.

The defendants also, in answer to the clai
law and under the Fatal Injuries Act, set up t
plaintiff of the proceeds of an accident polic
the deceased for $1,000, and claimed that
awarded under these heads should be dimi
amount of the policy.

Plaintiff joined issue and the action proce

The deceased was in defendants' employ as
man in charge of a gang of labourers engaged
of cleaning out cuts between Dumfries and Ga
of a branch of defendants' railway. A workin
sisting of a locomotive engine, tender, and 8 fl
conductor's van, in charge of an engine-driver,
brakesmen, and a conductor, was also engaged
On the morning of the accident they were
cleaning out a cut between Dumfries and a
Orr's Lake, where there is a siding situate
of Dumfries and between it and Galt. There w
ing on the same day between Orr's Lake and
known as a pile driver train. The conductor
the work train had received instructions t
against two freight trains coming from the
train coming from the east and also against th
train. According to these instructions, it was
the conductor and driver in charge of the trai
Rule 100 (c) of defendants' rules, which directs
to be moved under protection to the next stat
direction must, unless otherwise sufficiently
preceded by a flagman at least 2,500 yards (
poles) in advance, and be followed by a flag
2,000 yards (40 telegraph poles) in rear, and th
must be maintained. What was done by the
the work train was to place one of his brakesm

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mfries about 5 miles west of Galt, and the other at a point about 2 miles east of Galt, and a short st of a place called Leslie. Apparently this ar- was a sufficient protection against the trains from d east, but left no flagman for protection against iver train. The cars of the work train had been he cut near Orr's Lake and had then proceeded 120 Italian labourers, with the deceased in Leslie, and there unloaded the cars. The train d down to Galt and entered a siding there, the apparently intending to remain there until joined esmen, or one of them, to act as a flagman against river train. But in consequence, as he said, of entations of the deceased that the delay would 0 men or so standing idle for some time, he is mind and determined to back the train down e cut at Orr's Lake, and gave his orders accord- stood on top of the van; the deceased was in the e believed that situated as they were on the rear n, which was moving backwards, they could keep t look-out for the pile driver train. It was the ver's duty to keep a look-out towards him and signals every moment while his train was in mo- he conductor testified that situated as he was he that he was just as good as a flagman if the ver had been watching what he was doing. He ink it necessary to have a flagman, as they were owly and the pile driver was moving slowly also. eeding at the rate of about 8 miles an hour, as oached a place called Blair's Crossing, they ob- smoke of the pile driver train, and soon after saw at a distance of 13 telegraph poles or about 650

nductor made the usual signals with his arms to driver to stop, but for some unexplained reason took no notice, and, although the signals were until the trains had almost come together, the not stopped or the brakes applied. There were upon the first 6 flat cars, but none on the last 2, was no connection of the air brakes with the van. he appliances there were, the train could have been from 60 to 75 feet, so that there was ample time ought the train to a standstill and have avoided

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collision if the driver had obeyed the conduc
As it was the trains came together, and the
another man were killed.

At the close of plaintiff's case, and
all the evidence had been given, counsel fo
moved for a nonsuit, basing his motion ch
ground that the deceased had been guilty
of defendants' rules with regard to protection
trains. No defence of this kind was on the rec
contributory negligence set up. The trial Jud
allow the latter defence to be set up, on ter
fendants' counsel did not accept.

The trial Judge submitted to the jury que
were answered as follows:—

"1. Were the defendants guilty of any ne
caused the accident? A. Yes.

2. If so, state what the negligence was?
pany not having the train thoroughly equip
brakes and flagmen.

3. Did the deceased, Samuel Edward Muma
injuries of which he died, by reason of the negli
person in the service of the defendants who ha
or control of any locomotive engine or train
fendants' railway? A. Yes.

4. If so, name the person or persons and st
negligence was? A. The conductor, by disobeyi
moving train and engineer not receiving signal

5. At what sum do you assess the damages
mon law? A. $3,500.

(b) Under the Workmen's Compensation Ac

6. Apportion the damages between the wid
dren: (a) At common law? A. Widow $2,000;
$300 each.

(b) Under the Act? A. $1,400 for chil
$2,100."

(N.B. It would seem that the jury here
$700 instead of $2,100.) . . .

Upon these answers the trial Judge entered
$3,500 apportioned as specified by the jury.

On the appeal it was contended for def
plaintiff could not recover in either aspect of

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it was said the evidence adduced on behalf of plain-
ewed that the cause of the accident was the deceased's
dience of defendants' rules, and he was thus the
of his own death.

e rule in question (100 (c)) is one of a group of rules
the heading of "movement of trains," which are
intended to govern the conduct of the conductor,
, and train hands. They are for the guidance of
s in charge of the train and its movements, and the
ed was not one of these. He was in charge of the
ho loaded and unloaded the train, and as incident to
employment rode on it backwards and forwards to
om the cut and dump. He could not interfere with
anagement of the train, or give directions to the con-
or engine-driver as to the conduct of it. He might,
s, direct where it should be placed for the purpose
ng loaded or unloaded, but he had no control over the
s of the persons whose duty it was to manage the
ents of the engine and cars. The conductor and
were the persons responsible for the movements
fety of the train, and not the deceased. See rule 105.
uld not have compelled the conductor or driver to
the train, nor have authorized or required them to
rd or overlook their instructions or orders from the
s whose duty it was to give them directions with
to the movements and protection of the train. His
entations or persuasions, dictated no doubt by a
desire to save for the defendants the time of the
nployees who were kept idle by reason of the con-
's disposition of his brakesmen, were not a breach
rule. The power to act was with the conductor and
and it was their action which constituted a breach
rule, if breach of the rule there was. The case is
all like Deyo v. Kingston and Pembroke R. W. Co.,
. R. 588, 4 O. W. R. 182, and other cases which were
n this branch of the case, for in these cases the act
employee was one against which there was an express
tion which extended to him, or it was a gross neglect
e rule which extended to his employment and to
it was his duty to conform. In this case it is not
o defendants to contend, as they did in argument,
e deceased was guilty of contributory negligence,
en if what he did could be said to be of that nature,

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the defence was not set up, and there is no find
jury upon it. Neither is the argument that th
voluntarily assumed the risk of accident resu
the conductor's and driver's breach of the rule
have not obtained a finding of the jury to t
Williams v. Birmingham Pottery and Metal C
2 Q. B. 338.

But, whether or not the action of the cond
driver in going out under the circumstances
considered a disobedience by the deceased of t
not material, for it was not the cause of the
The rule requires the placing of the flagmen w
cated, unless the train is otherwise sufficiently
According to the conductor's evidence, he cons
train sufficiently protected by the means he too
against the pile driver train. And, if the driver
his duty, the accident would not have happened.
cause of the accident was the negligence of the
not keeping on the look-out for and obeying the
signals. At the rate at which the trains were
the distance they were apart when the conducto
the engine-driver, and with the means at the eng
command to stop the train within 60 or 75 feet,
ample time and opportunity to have avoided th
The engine-driver, who was not called as a w
undoubtedly neglecting his duty, and thus brou
the accident. And the finding of the jury to th
well supported by the evidence.

This is sufficient to render defendants liable t
But there remains the question whether plaintiff
to retain the judgment entered in her favour
words, whether defendants are liable at comm
only under the Workmen's Compensation Act.

The claim of liability at common law is rested
negligence on the part of defendants in not prov
cient air brakes or appliances to properly control
train, and in not providing a sufficient numbe
hands. The jury have found that defendants
gent in not having the train thoroughly equi
air brakes and flagmen. But not only are the
contrary to the evidence, but there is really n
on which the jury could reasonably make them
evidence goes to shew that the air brake appli

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train was provided were quite sufficient to have it and brought it to a standstill within a very nce. It was said that if there had been a con- rough to the conductor's van the air brakes e been operated from it and the train stopped y. The evidence also shews, however, that this applying the brakes is not unattended by danger, ery seldom put into practice. It may result in " the cars, a very serious thing in the case of owded with workmen. Section 211 (b) (I.) (II.) ilway Act (1903) requires that on all trains assengers the brakes shall be continuous and stantaneous in action and capable of being ap- ill by the engine-driver or any brakesman, and must be self-applying in the event of any failure ainty of its action.

g at all the provisions of the section, it seems hat a work train such as that in question here he class referred to in the sub-sections quoted.

trains of this description cannot be considered senger trains or trains carrying passengers, as s are generally understood.

s to the work train in question, the evidence defendants sent it out equipped as sufficiently as kes and appliances as is usual or customary, and jury resulted from any lack in this respect. The case with respect to the number of men in charge. was quite sufficient for the proper handling of the nay be that the disposition of them made by the was not a proper one, but for that defendants be blameable. If negligence at all, that would ce of the conductor. But, again, the want of the or flagmen was not the cause of the accident. A nt to the rear of the work train could not have than signal the engine-driver to stop. This by the conductor at a time and distance amply o have enabled the engine-driver to stop the train the collision.

case comes back to the negligence of the engine- he action is, therefore, maintainable only under nen's Compensation Act, and at the trial judg-

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ment should have been entered for the $2
found against defendants under that head.
ants paid into Court $2,102.03. In this view o
question as to the insurance money paid to
not arise.

The judgment entered at the trial should
and instead judgment should be entered in f
plaintiff for $2,100, apportioned in the ratio
jury.

The plaintiff to have costs up to and inc
delivery of the defence. The defendants to
costs up to and inclusive of the trial. Ther
costs of the appeal to either party.

MARCH

C.A.

JOSEPH v. ANDERSON AND MACBE

*Specific Performance—Agreement for Lease—Re
by Percentage on Cost of Building to be Ere
of Rent—Consent of Lessees to Extra Cost
Construction of Agreement—Dependent or
Covenants.*

Appeal by plaintiffs and cross-appeal by def
judgment at the trial of BRITTON, J., 7 O. W. I

The action was brought to compel specific
of an agreement for a lease by plaintiffs to d
a warehouse about to be built in the city of
a term of 5 years, with a right of renewal f
period of 5 years.

The appeal was heard by MOSS, C.J.O., OSL
MACLAREN, MEREDITH, JJ.A.

I. F. Hellmuth,, K.C., and G. L. Smith, fo

H. H. Dewart, K.C., and G. S. Hodgson, fo

GARROW, J.A.:—The rental was to be a
reference to the valuation of the land, fixed

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ich 4 per cent. per annum was to be paid, and a
um of 8 per cent. upon the total cost as certified
rchitect of the construction of the building, includ-
ations and architect's fees. And plaintiffs agreed
would not expend nor authorize the expenditure
building of a sum greater than $21,000 without
ts' consent. The building was to be a five storey
ment warehouse and office building, to be built
ance with plans to be prepared by Messrs. Symons
rchitects, to the satisfaction of both parties, and to
ut and finished in such manner, with the approval
iffs, as should be desired by defendants, with
nd passenger elevators and such vault accommoda-
efendants might require. A building of the kind
iption agreed upon was built to the satisfaction of
ts, who are now in possession, and the sole ques-
lispute is the amount of rent payable under the
t, both parties asking and submitting to a specific
nce of the agreement according to its proper con-

e the building was begun, the architect was asked
te its total cost, which he did, at $20,500, and the
n in the agreement that plaintiffs would not ex-
ond $21,000 without defendants' consent was based
t. But in the end he certified to a total expendi-
32,459.10, and out of such increased expenditure
n the dispute, plaintiffs claiming rent based upon
expenditure, and contending that the clause limit-
xpenditure is in effect an independent covenant
ich defendants' proper remedy is in damages for
n.

n, J., held, quite properly, I think, against that con-
nd fixed the rent upon the basis of the $21,000 and
onal sum of $4,761.75, which he allowed, also cor-
my opinion, as representing the cost of additions
ges consented to by defendants, but to which
think, be added the further sum of $300, the cost
nthouse, which became necessary upon the removal
evator machinery from the basement to the roof,
lants' request and for their advantage. And he
the rent to be payable quarterly in advance, a
n objected to in the reasons against the appeal,
ently not urged upon the argument before us.

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The question of dependent or independent
of course one of construction. And its proper
pends upon a consideration of the agreement
with a view to ascertaining what the parties rea
as to the matter in dispute by the language
have used. It is of no consequence where the lin
is found in the agreement. It may precede or
low, as in the present instance, the larger or
vision—but, wherever it is, the real question
the parties really intend? Did they intend bot
to stand and each to have its full and indepe
or did they intend the one to limit and define t

Here the sole dispute is as to the amount
Both clauses bear upon the question. Under th
the rent would be a certain sum easily calculate
other a certain less sum, also easily calculated
the right sum is the exact matter in issue. Di
intend that the larger sum should be fixed un
clause, and that defendants should be merely
in damages if the expenditure as limited was ex
the second? If we accede to plaintiffs' proposit
hold that singular result to have been and to
intent and meaning of the writing.

The plain intention was, I think, to supply i
ment the whole material for definitely fixin
building was constructed, the amount of the re
during the term by defendants, and for that
clauses bearing upon that question must be re
strued together. They are clearly not independ
subject matter or intention, but, on the cont
clearly related and dependent as two cove
well be.

We were referred by counsel for plaintiff
cases, but, where so much depends upon the fa
yond general principles could be hoped for in th
One case was Hunt v. Spencer, 13 Gr. 225, in th
of Error and Appeal. But no one could serio
that the covenant there held to be independe
sembles in principle the covenant in the present
indeed, the whole reasoning in that case seems t
the present defendants rather than the plaintiffs
of course, an authority for the proposition th
equity will under special circumstances enforce

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enant and leave the defendant to his remedy in r the breach of another in the same deed. A well tance is Gibson v. Goldsmith, 5 D. M. & G. 757, pproved in Hunt v. Spencer. But, as is quite ap- will only be done where the Court, after examin- ed, comes to the conclusion that it was not the f the parties that the covenants should be taken ion; in other words, a court of equity proceeds uestion of construction exactly as would a court l, if the covenants are found by construction to ent, the Court will enforce the whole or none. when the conclusion is reached that the coven- dependent, the Court, it is conceived, would re- elief of a part performance if that would work the other side, upon the well known ground o seeks equity must himself do equity.

endants have, it appears, been able to make very subleases of part of the building, because, it is e additional expenditure made by plaintiffs. It e forgotten, though, that for over $5,000 of this expenditure defendants are by the judgment ap- n, with the $300 added by this judgment, to pay that sum practically includes all the expendi- appears by the evidence to have increased the value, although that is, I think, quite immaterial. ven suggested as a reason for treating the cov- dependent that it is inequitable on the part of to refuse under the circumstances to pay rent hole, and that they should for this reason be left nedy in damages or else give up possession.

defendants claim is what by its true construc- reement gives them. It is binding not only upon but upon the Court, and there is nothing in- n the defendants claiming a full rather than ormance, even if the results should turn out to rable for them as plaintiffs appear to think.

m not at all certain that the result in money ifferent if the covenants were treated as inde- Prima facie at least the measure of damages e difference in rent which defendants would be pay for the accommodation they bargained for. t think it profitable to pursue this aspect further.

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I think the appeal fails except as to the $3
the cross-appeal also fails, and that there shoul
in this Court to either side under all the circ

OSLER, J.A., gave reasons in writing for t
clusion.

MOSS, C.J.O., and MACLAREN, J.A., also c

MEREDITH, J.A., dissented, for reasons stat

MARCH

C.A.

CLARKE v. UNION STOCK UNDERWRIT
PETERBOROUGH.

*New Trial—Discretion of Court below—Refusa
Appeal to Interfere—Affidavit of Merits—*

Appeal by plaintiff from order of a Divisio
O. W. R. 757) setting aside the judgment at
favour of plaintiff in an action upon two pron
and directing a new trial, with leave to defenda
by setting up new defences.

The appeal was heard by MOSS, C.J.O., OSL
MACLAREN, MEREDITH, JJ.A.

G. H. Watson, K.C., and S. T. Medd, Pete
plaintiff.

H. E. Rose, for defendants.

OSLER, J.A.:—I am clearly of opinion tha
from the judgment of a Divisional Court gr
trial to the defendants on payment of the
appeal to that Court should be dismissed. T
granted as a matter of discretion under all
stances of the case. No doubt, cases may oc

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retion has been exercised upon a wrong principle
a misapprehension of the facts, as, e.g , where a
has been granted after the pinch of the case has
and the only effect is to give the losing party a
make good his ground: Germ Milling Co. v. Rob-
Times L. R. 71; or where it has been granted
enable him to give corroborative evidence, etc.:
v. Hortin, 22 A. R. 51; Miller v Confederation
Co., 14 A. R. 218; but, unless the case appears
cted by some vice of that kind, a second appel-
ought not readily to interfere and restore the
the trial.

k that in the present case there was a considerable
misapprehension and confusion at the trial, which
n defendants' witnesses not being called. The
ord indicates a situation in which justice probably
hat all the facts relating to the note and stock
n should be brought out, and the pleadings, if
amended, and the plaintiff's title as an independ-
for value or as trustee for the original buyer dis-
Ve may think it would have been more satisfactory
rt below had required the motion to be supported
it, but, as they did not do so, we shall not inter-
at ground.

l dismissed with costs.

C.J.O., GARROW and MACLAREN, JJ.A., concur-

DITH, J.A , was of opinion, for reasons stated in
hat the new trial should not have been granted,
efendants had not disclosed on affidavit a good de-
the merits, likely to be successful at a new trial;
n favour of allowing defendants, if they had a
nce on the merits, to disclose it upon affidavit
costs of the appeal to be costs in the action to
n any event.

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MARCH

C.A.

REX v. HAYS.

Criminal Law—Statutory Offence—Grand Tru Company of Canada—Breach of Provision of A poration—Omission to Issue Tariff of Fare Class Passengers—Failure to Provide Third riages — Conviction of General Manager of Criminal Code, sec. 138—Railway Commissio

Case reserved by the police magistrate for Toronto upon a summary trial and conviction fendant, the second vice-president and general the Grand Trunk Railway Company of Canada, did, during 1906, at the city of Toronto, contr without lawful excuse, disobey sec. 3 of ch. 37 of 16 Vict. (Province of Canada), by omitting to d section requires to be done, viz., to carry thir sengers for the fare or charge of one penny fo travelled, and to provide that at least one train third class carriages shall run every day thro length of the line, contrary to the provisions of the Criminal Code.

The questions reserved were whether the co made without jurisdiction, and whether it wa in law.

The case was heard by MOSS, C.J.O., OSLE MACLAREN, and MEREDITH, JJ.A.

W. Nesbitt, K.C., and A. M. Stewart, for contended that another mode of punishment is law, under sec. 294 of the Railway Act of 190 finding of the magistrate is that the company while the defendant is sentenced; that the mag no jurisdiction over defendant; that under sec. Code there is no disobedience to an Act of the of Canada or of any legislature in Canada, the st which the conviction is made being of the old Canada; that there was no evidence of a wilful d of the statute; that sec. 3 of 16 Vict. ch. 37 h

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subsequent legislation; that the whole matter
ted in the Board of Railway Commissioners, etc.

Curry, for the Crown.

J.A.:—This conviction is open to a great many
most of which I should say are fatal to it, but
r two of the most obvious need be noticed.

efendant is second vice-president and general
f the Grand Trunk Railway Company of Canada.
en summarily tried under part LV. of the Crim-
for an offence against sec. 3 of 16 Vict. ch 37,
ct to incorporate the Grand Trunk Railway Com-
sec. 138 of the Criminal Code, which enacts that
is guilty of an indictable offence and liable to one
risonment who without lawful excuse disobeys any
e Parliament of Canada or of any legislature in
wilfully doing any act which it forbids, or omit-
any act which it requires to be done, unless some
other mode of punishment is expressly provided
Section 3 of the Railway Act referred to enacts
fare or charge for each third class passenger by
on the said railway shall not exceed one penny
or each mile travelled, and that at least one train
t third class carriages shall run every day through-
ngth of the line."

mplaint is that the defendant—not the company
beyed this section by omitting to do that which
requires to be done. The magistrate finds that
ny have not at any time during the year 1906
sued a tariff of charges or fares payable by each
passenger by any train on said railway for each
lled; that the company have not during that time
a third class passenger to travel by any train on
y at the fare or charge of one penny currency
ile travelled; and further that the said company
luring that time provided that at least one train
it third class carriages shall run each day from
o Toronto "by part of the said railway."

hese findings the magistrate proceeded to convict
ant Charles M. Hays—though no formal convic-
to have been drawn up—of the offences charged,
onviction having been questioned on the ground

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that it was without jurisdiction and was errone
of law, the magistrate submitted the question t
whether upon the facts so found the conviction

Upon the mere statement of the case the a
be that the conviction is wrong.

1st. The charge is that Hays committed
while the findings are that the company did
absence of some clear statutory enactment, th
cannot be punished for the default of his compa

2nd. There is no authority to prosecute th
under sec. 138. The obligation, if there be one,
pany's obligation, and the company, and not t
however important and commanding the positi
occupies, is the only one to be prosecuted, if a
will lie, for its breach, so far as sec. 138 of the
invoked for that purpose. That a corporatio
under that section be punished by imprisonmen
warrant the prosecution of one of its servants.

Quære, whether the latter part of sec. 958
could be applied if the corporation itself had
cuted?

3rd. Section 138 cannot apply under any ci
inasmuch as sec. 294 of the recent Railway Act,
ch. 58, now enacts that "the company or any
officer thereof . . . doing, causing, or perm
done any act, matter, or thing contrary to th
of this or the special Act . . . if no other
this or in the special Act provided for such act
is liable for each offence to a penalty of not le
and not more than $5,000, in the discretion of
I do not suggest that a prosecution would lie
section for the particular omission complained o
official of the company. Doubtless some acts
may be those of the individual servants of the c
others can be properly attributed only to the
corporation itself. It is enough to say here t
deprives sec. 138 of the Criminal Code of its a

I think we ought not on this appeal to de
question whether sec. 3 of the Act of 1852 h
pliedly repealed by the Railway Act of 1903.
question which can be more conveniently tried
of by proceedings taken before the Railway

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ecision in that respect can be reviewed by the Su-
ourt.

LAREN and MEREDITH, JJ.A., each gave reasons in
for the same conclusion.

, C.J.O., and GARROW, J.A., also concurred.

iction quashed.

MARCH 14TH, 1907.

C.A.

DRULARD v. WELSH.

*atent—Construction—Trespass to Land—Boundaries
idence—Surveys and Plans—Paper Title—Statute of
ations.*

al by defendant from order of a Divisional Court,
R. 575, 11 O. L. R. 692, affirming judgment of
, J., 7 O. W. R. 87, in favour of plaintiff, in an
r trespass to land, and for a declaration of boun-
for damages, etc.

appeal was heard by MOSS, C. J. O., OSLER, GAR-
ACLAREN, and MEREDITH, JJ.A.

hite, Windsor, and E. Meek, for defendant.

. G. Ellis, Windsor, for plaintiff.

, C.J.O.:—. . . A perusal of the testimony and
examination of the conveyances, maps, plans, and
cumentary evidence produced at the trial, have led
e conclusion that the judgment appealed from can-
ustained.

plaintiff's case, as set forth in the statement of
that he is the owner of a small piece of land, form-
e contends, part of lot 7 on a plan of subdivision
l 274 in the city of Windsor, and that, being such
nd in possession of the parcel in question, the de-

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fendant entered upon it, tore down the plaintiff's
erected other fences upon it and remained in po
it. The claim is for damages for the trespasses,
possession, and a declaration of boundary between
tiff's and defendant's lands.

The defendant denies the plaintiff's title,
title in herself, and charges the plaintiff with
upon her lands.

The formal judgment pronounced at the tri
firmed by the Divisional Court, declares that th
is the owner of the parcel in dispute, and that th
is entitled, as against the defendant, to recover
of the same. It further declares that the northe
the plaintiff's lands is the southern limit of a la
as the old alleyway running from Janette street
Pitt street, and that the southerly limit of the d
land, as described in the patent to Samuel Port,
February, 1874, is the northern limit of the lan
awards the plaintiff $5 damages for the trespasse
costs of the action.

To entitle him to the declarations in the ju
was incumb nt on the plaintiff to prove his ow
shewing a paper title, or, failing that, a title a
length of possession under the Statute of Limitati

To entitle him to recover the damages it migh
cient to establish a possession, at the time of the d
entry, of such a nature as to require the latter
better title in order to justify her entry. But
relief, it is obvious, has been awarded upon the b
plaintiff having established a title in fee, and not
bare footing of possession.

So far as the paper title is concerned, the
instruments put in at the trial do not establish a
chain of title of any part of lot 7 from the owner
of the original township lot to the plaintiff. Bu
that by for the present, there is a question wh
triangular piece in dispute is embraced in or was
by the conveyances through which the plaintiff cla
after the date of plan 274, viz., 2nd June, 1884.
observed that the plan 274 was prepared after th
the patent from the Crown through which the
claims, and could not therefore affect lands validl

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conveyed by the patent. But, dealing for the present the plan and the conveyances subsequent to it, and ning—though the proof is not at all satisfactory—that ot was vested in Peter Janette by virtue of proceedings action, we come to a conveyance by him to Samuel er, in which lot 7 is inaccurately referred to as in the vision of farm number 78, according to Wilkinson's 274, and there is no further description. Then it is that Stover sold to Alexander Laforge, but the con- nce was not produced or put in at the trial nor at any of the case, and there is nothing to shew the descrip- by which the lot was conveyed, if at all. Next is a deed nveyance, dated 4th March, 1889, from Alexander La- to August Gutterman; then a deed of conveyance 26th August, 1903, from August Gutterman to John oster; and finally a deed of conveyance dated 1st Sep- er, 1903, from John J. Foster to the plaintiff. In each e deeds produced a different description is adopted, but se comparison with the plan and with each other, of various descriptions, seems to shew that, though y and loose in expression, they embrace the piece of in dispute as shewn on the plan No. 274. But this does dvance plaintiff's case unless he has also shewn title in grantors of the various mesne conveyances through h he claims. The piece in dispute forms part of original umber 77, and the title must be ascertained by refer- to the dealings with that lot. As already noted, plan cannot affect the title to any lands validly granted or prior to its date.

The defendant claims title to the piece in question ugh a grant from the Crown, dated 13th February, 1874, ne Samuel Port, of part of lot 77. The description is to be, and no doubt is, defective, by reason of an omis- of the proper magnetic bearing in the southern boun- , but, nevertheless, following on the ground the metes bounds in the course stated, the Crown grant embraces ut a few square feet of the piece in question. At all ts it leaves no room for the parcel claimed by the plain- But his contention is, first, that the proper starting t of the easterly line of the land comprised in the Crown t is not on what is now the southerly line of Sandwich t, but on a line to the north, which it is said was the nerly line of Sandwich street when the Crown grant

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issued, and, secondly, that, if the present line
street was the starting point, then the grant co
that was not intended to be included in or con
and which the Crown could not grant.

As to the first ground, the great preponder
timony goes to shew that in 1874, when the
issued to Port, the line of Sandwich street, at
which the east line of the property starts, was
to-day. Indeed, it goes far to shew that as
particular part the line has never changed
Queen's highway" was established. There is
shew that in 1860, or at least 14 years before
grant, the line was where it is to-day.

To give effect to the plaintiff's second cont
declare in substance that the letters patent t
issued by the Crown erroneously or by mistak
dently, or to reform the instruments, forms o
which no case is made by the pleadings; and at
plaintiff's counsel disclaimed any wish to see
relief.

But the substantial difficulty with which th
met is that, as the trial Judge has found, the
not clearly and satisfactorily proved that the
cluded in any grant from the Crown through w
claim, but apparently it has been considered as
Janette lands; and that, as already pointed
failed to shew a chain of paper title vesting in
ette title, if any.

He is therefore not in a position to call for
tion against the validity or effect of the grant o
limit, cut down, or control its operation.

In this view it is unnecessary to enter upon
of the question whether, assuming that the pla
locus standi, and that the matter was open to h
is shewn on the evidence justifying interferen
instrument. But, on an examination of the evi
mentary and oral, it does not appear to me to
that the Crown granted to Port more than he
to under his conveyance from Normandin. Th
upon the plaintiff to make out clearly and satisfa
such was the case, and in this I think he has no

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e claim of title founded on length of possession was tablished. The evidence fails to shew a continuous, ive, and undisturbed possession by the plaintiff or his essors in title sufficient to put an end to the defen- title under the letters patent. At most there is a case of divided possession, each party claiming to e piece and disputing the claim of the other. Fences ut up and torn down and replaced and their situation ed. There seems to have been very little actual pos- , but the defendant having the paper title was not d to shew actual possession.

the other hand the plaintiff could only displace the lant's paper title by proof of actual, continuous, and ive possession for the statutory period. And on this eponderance of testimony is in the defendant's favour. , therefore, entitled to rest upon her paper title, which ot been displaced by anything that has been shewn. laintiff has failed to shew a better title to the piece d in question, and the title conferred by the letters t must prevail.

e result is that the appeal must be allowed and the iff's action dismissed with costs. There was an in- l counterclaim by the defendant seeking damages for ss by the plaintiff, but no actual damage was shewn, e claim was not pressed in appeal. A dismissal of the will suffice to dispose of the real issues.

EREDITH, J.A., gave reasons in writing for the same sion.

LER, GARROW, and MACLAREN, JJ.A., concurred.

MARCH 14TH, 1907.

C.A.

LLINGFORD v. OTTAWA ELECTRIC R. W. CO.

Railways—Injury to Passenger Alighting from Car— gligence — Contributory Negligence—Case for Jury— sts—Discretion—Appeal.

peal by defendants from order of a Divisional Court aside the judgment entered at the trial by TEETZEL,

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J., who at the close of plaintiff's case withdrew
jury and dismissed the action; and cross-appeal
against the part of the order of the Divisional C
ing no costs of the former trial and of the app

H. S. Osler, K.C., for defendants.

J. A. Ritchie, Ottawa, for plaintiff.

The judgment of the Court (MOSS, C.J.O., C
ROW, MACLAREN, and MEREDITH, JJ.A.), was

MOSS, C.J.O.:—The action is to recover dam
juries sustained by plaintiff in consequence of
by an electric car which was being operated on
line of railway in the city of Ottawa. He was
on a car proceeding in a northerly direction a
street on the easterly side of the roadway, and
of alighting at the junction of Sussex street w
street, which enters Sussex street from the ea
not intersect it. On nearing the crossing over S
from the junction of the south side of Redpath
the east side of Sussex street, he signalled the
who rang the bell to warn the motorman to stop
crossing is one at which the cars ordinarily
usual course to permit persons to enter or aligh
is a plank walk from the junction across Suss
the sidewalk on the west.

The speed of the car was slackened, apparen
ence to the conductor's signal. As it neared t
plaintiff stepped upon the rear platform, prepar
when the car came to a standstill. But before
so, or plaintiff had alighted, the conductor rang
proceed, and the movement of the car was quic
this time the front end had reached the crossing
was evident it was not going to be drawn up, plai
or jumped from the platform or step. He alig
but found himself in front of a cab with one h
was being driven swiftly towards him from the
Sussex street. In order to avoid a collision wit
and also in order to cross to the west side of Su
to which he was bound, plaintiff turned behind
had just left and passed on towards the other tr
reached it, he became aware of a car coming tow
a rapid rate. To avoid being run down he flung

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, thus saving his life, but he was seriously in-
said it was impossible to get out of the way of
was coming so fast without ringing the bell or
had the start, and could not hold himself, so it
o him the best thing he could do was to throw
the fender.

l he did not hear the gong sound, although if it
ung he would have heard it. By one of the regu-
ming part of the agreement between the city of
d defendants, under which they operate their
the city highways, it is provided that each car is
plied with a gong, which shall be sounded by the
en the car approaches to within 50 feet of each
ut, unfortunately, the attention of the trial Judge
awn to it or some of the other regulations which
pose duties on defendants with respect to persons
r crossing the streets of the city. It is, however,
ered from plaintiff's testimony that he was aware
s the usual practice to sound the gong at cross-
he expected it to be done when a car was approach-
ing.

ial Judge was of opinion that there was absence
hat it was defendants' duty to sound a gong, or
ing to sound it caused the injury, and that the
hewed that plaintiff was injudicious and careless
imself guilty of grave negligence in stepping on
without taking the precaution of looking to see if
approaching. And he withdrew the case from the

ppeal the Divisional Court reversed the judgment,
opinion that, having regard to plaintiff's state-
jury might reasonably come to the conclusion
s aware of the rule with regard to the sounding
ng, and relief on it, and that, if the gong had
plaintiff would have been warned and might not
himself into a position of danger; in short, that
uestion for the jury to say whether he had acted
nable manner under all the circumstances; and
ted a new trial.

v of all the evidence, the conclusion of the Divi-
rt appears to be right. It was, of course, unfor-

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tunate that the trial Judge was not made aware
lations above referred to. In order to do so
necessary to cite to him the Act 57 Vict. ch. 7
which the agreement with the city is validated
as intimated by the Divisional Court, the regulat
the force of a statutory requirement, yet the proc
to comply with a precaution which defendants
nized as important for the safety of persons usin
ings on streets occupied by the railway is evide
jury of negligence in the conduct of the car.

In its circumstances the case presents ma
similar to those in Winnipeg Electric R. W. Co.
S. C. R. 515, and Montreal Street R. W. Co.
champs, 37 S. C. R. 685.

It was argued for defendants that the reg
not applicable to such a crossing as the one in q
asmuch as Redpath street does not extend to
Sussex street. It is true that Redpath street do
Sussex street in the sense of intersecting it. Bu
plank walk crossing Sussex street from the
Redpath street, used by foot passengers for going
street, and at which defendants' cars stop whe
passengers to take up or let down. And there
expressions in the regulations which shew the
the parties to the agreement attached to the w
ing" as there used. For example, regulation No
that, should there be any foot passengers on a
before the car approaches the same, the car shall
so as to permit such passengers to cross. No.
that no car shall be allowed to stop on or over
"or in front of any intersecting street." And N
to intersection of streets. There is enough in
ences in the agreement to shew that the term "c
therein employed, was intended to indicate any
along the street occupied by the railway where
walk laid for the purpose of enabling foot pa
cross from one side of the street to the other, an
cars would stop to take up or let down passenge

See also Brenner v. Toronto R. W. Co., ante
the subject is dealt with at pp. 203-4.

The question whether the gong was sounde
compliance with the regulations bearing on the

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charge of cars when approaching or at crossings. the jury.

appeal fails and must be dismissed.

h regard to the cross-appeal, the matter of the costs thin the discretion of the Divisional Court, and that on is not to be lightly interfered with under any cir- nces: see Beatty v. McConnell, 8 O. W. R. 916. In se it cannot be said that the discretion was wrongly ed, and the cross-appeal must be dismissed.

MARCH 14TH, 1907.

C.A.

WESTERN COMMISSION CO. v. MOORE.

al and Agent—Authority of Agent—Contract—Breach —Terms.

peal by plaintiffs from order of a Divisional Court ng judgment of TEETZEL, J., dismissing the action, was brought to recover damages for breach of a con- Plaintiffs were commission merchants in Toronto, fendant a mill-owner at Falkenberg, in the district koka. The contract was made by one McBeth, pur- to be acting as defendant's agent, to sell to plain- efendant's cut of hemlock for the year 1906. The nal Court held that the terms of the contract were the authority of McBeth.

appeal was heard by MOSS, C. J. O., OSLER, GAR- MACLAREN, MEREDITH, JJ.A.

N. Ferguson, for plaintiffs.

Laidlaw, K.C., for defendant.

LER, J.A.:—I am of opinion that the order of the nal Court, affirming the judgment of Teetzel, J., at al, is right and should be affirmed, upon this short , that defendant is not bound by the contract into er agent, McBeth, assumed to enter on her behalf. a special and limited written authority to sell the

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lumber to be manufactured by defendant out
of logs owned by her. The terms of this au
known to plaintiffs, and a copy of it was attach
referred to in the alleged contract. Apart fro
tion whether he had any authority at all to sell
before he had offered to sell to Laidlaw & Co
upon the face of the contract which plaintiffs re
it contains terms not warranted by the written
any authority conferred by defendant upon
more onerous than she was willing to submit to
omits other terms which she had expressly re
obtained for her.

These are obvious difficulties which no a
surmount or remove, and the appeal must ther
missed with costs.

MEREDITH, J.A., gave reasons in writing f
conclusion.

MOSS, C.J.O., GARROW and MACLAREN,
curred.

MARCH

C.A.

JONES v. MORTON CO.

Master and Servant—Injury to Child under 14
Factory—Liability at Common Law—Work
pensation Act—Factories Act—Findings of
gence—Damages—Liability of Owners of Bui
of Part of Building for Factory—Use of Ele
Injured by—Breach of Factories Act.

Appeal by defendants from judgment of A
the trial, upon the findings of a jury, in favour
plaintiff, and dismissing the action so far as
the adult plaintiff, was concerned.

The action was brought to recover damages
infant plaintiff by the fall of an elevator used

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s, the defendants the Morton Company, in or in con-
n with their factory in the city of Toronto, as tenants
an indenture of lease made by one Chatworthy as les-
he reversion having subsequently but before the acci-
been acquired by the defendants the Toronto General
s Corporation.

e appeal was heard by MOSS, C.J.O., GARROW, MAC-
, and MEREDITH, JJ.A.

F. Hellmuth, K.C., and R. H. Greer, for defendants
orton Co.

E. A. DuVernet and A. E. Knox, for defendants the
to General Trusts Corporation.

A. Masten and J. H. Spence, for plaintiffs.

ARROW, J.A.:—The premises are described in the lease
third flats, comprising two rooms extending from the
to the rear of the building, together with the right
rance in and passage in and out of the front of said
ses through the front door and stairway and passage
ading from Richmond street. And the lessors coven-
to give the use, together with other tenants in the
ngs, to the lessees, their agents, clerks, and tenants,
elevator in said building for freight purposes only in
lay, and to keep the same in repair and good working
with a right of way to and from said elevator. And
ed that "the said lessor will not be liable for any
e or any accident to any member of said lessees or any
ir employees through using or interfering with the
or, but the said lessor will keep the elevator in proper
g order and repair, on notice being given to him by
id lessees that such repairs are required and necessary
time to time."

e infant plaintiff was at the time of the accident under
e of 14 years, and he claims to recover under: (1) the
n law; (2) the Workmen's Compensation for Injuries
nd (3) the Ontario Factories Act.

e defendants the Morton Company by their statement
ence denied in general terms all the allegations in
tement of claim, as did also in effect the other de-
ts.

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Questions were submitted to the jury and ans
effect being as follows: the infant plaintiff was
the dropping of the elevator; the drop was caused
in the cylinder; such cause was due to negligen
consisted in not keeping the elevator in proper re
told it was out of order; both defendants were n
this in answer to the question, "Whose negligence
the infant plaintiff's age was under 14; he was en
contravention of sec. 3 of the Ontario Factorie
was injured in the course of his employment; suc
ment in contravention of the statute was the cause
ing injured; the elevator was at the time of th
being used as a freight elevator; and they assessed
ages at $4,000, for which judgment against both
was given.

The defendants the Morton Company carry on
ness of manufacturing check books, and the infan
was employed at the time of the injury in the shippi
ment as helper under one Izzard. He was sent
to the basement to obtain a packing case in which t
shipment a quantity of check books. He procure
and placed it on the elevator, which, after proceed
his guidance from the basement until between the
second floors, stuck. He there left it and returned
and reported that the elevator would not work.
uncontradicted account of the conversation is as fo
You understood from him then at that time tha
was on? A. The case was on the hoist—yes—that
the case on the hoist. I asked him if he could get t
the hoist. He said, yes. I said take the case of
but do not use that hoist, take it around to the
and use that hoist. He went down the front stai
I told him. That was the last I heard of him u
the young men from the Featherbone Company to
helper was hurt."

The infant plaintiff was found lying on th
which had in some way reached the bottom or sta
in the basement. From the severity of the inju
were chiefly to the head and especially the jaw,
plaintiff appeared at the trial to have no recollecti
thing that happened after he got the case on th
and commenced the ascent. He remembered th
got up past the first floor, and there all memory c
did not remember getting off and going upstairs

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appears to me a rather serious oversight, the evid-
not disclose the location of the packing case when
plaintiff was found, whether on or off the elevator.
ere even any evidence of its size so as to estimate
le difficulty a child so young would have in remov-
n the elevator, suspended as it was between the two

ussell, the expert who examined the elevator after
nt, found it leaking in the piston head from defec-
ng. He also found the governor without a rope,
fore useless to operate the clutches which are
to play by it when excessive speed arises from any
ut the leaking alone would, as the jury found, I
perly, explain and make probable the fall of the
nd a sudden and sharp fall would also reasonably
e very severe injury to the infant plaintiff, other-
y unexplained, and these were inferences quite open
vn by the jury upon the evidence, in my opinion.
is not explained is why the infant plaintiff was
elevator at all, which he had been told not to use.
s were to remove the case from the elevator, and
was upon it for that purpose he should not have
it at all.

fant plaintiff's rights, as against the defendants
to General Trusts Corporation, must necessarily
olly upon implied invitation. There were no con-
ghts between them whatever. And, in my opinion,
tion to use the elevator which could have been
inferred must be conclusively regarded as cancelled
rawn when he became aware that it was out of
was told not to use it. It would be impossible after
fer the invitation, or a representation that the
as in order and reasonably fit for use. For this
action, in my opinion, wholly fails against the
the Toronto General Trusts Corporation.

think the action against the defendants the Mor-
any also fails, so far as it is based upon the com-
and upon the Workmen's Compensation for In-
. Upon the former because it is clear upon the
vidence that he was not using the defective elevator
tor at the time of his injury, or if he was that he
so in defiance of the explicit order of Izzard. And
atter because of a total lack of the necessary find-

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ings by the jury upon which to base a judgm
of the order given by Izzard. Izzard probably
to give the order, and it was one to which prob
plaintiff was bound to conform, and he was pr
because in compliance with it he had got upo
to remove the case. One may at least reasona
that much, but it was clearly a matter for th
upon, and that not having been done I see
upon this cause of action but that which
namely, failure.

But, in my opinion, the infant plaintiff ha
good cause of action upon sufficient findings
tario Factories Act, in respect of which he is
cover the same amount of damages as under t
Compensation for Injuries Act. (See 3 Edw
sec. 46.) So that the failure to recover unde
in the result, really unimportant.

By the Ontario Factories Act, R. S. O. 189
1, sub-sec. 5, "child" is defined as a person
of 14 years. By sec. 3 it is provided that no
employed in any factory except those mentio
the factory in question is not one. The in
employment was therefore wholly unlawful,
facie case was made simply by proof of the ag
ment, and the injury. See Fahey v. Jephco
448. To such prima facie case no answer was,
There is no finding of contributory negligen
ently no request from either of the defendant
a question even submitted.

It was contended before us, faintly I thou
was no evidence that the defendants the Mor
premises were in fact a factory, and that in
elevator did not form part of the factory.

In the statement of claim the premises ar
tory, and the elevator is there spoken of as u
tory. The defendants, it is true, in formal
the plaintiffs' allegations, but they raised no
upon the questions now under consideration.
also treats the premises as a factory, and t
used in connection therewith. And in his cha
told the jury that the premises was a facto
Act, and that the elevator for the purposes of
a part of the factory. To the latter stateme

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r, which he apparently and wisely I think aban-
unsel for the defendants the Morton Company ob-
at the elevator and the elevator shaft was not any
e defendants the Morton Co.'s factory, that under
and upon the facts it was proved that they had
cess to it for use with the others, and it was not
f the factory."

as this objection is based upon the terms of the
a question of law, and was for the Court, and I
the charge and am against the objection. And, if it is
of fact, I should still be against it. The infant
ad and has nothing to do with the exact title under
employers used or occupied the factory premises.
sputed facts are that they used the elevator as
t of the factory; and part of the infant plaintiff's
which he had been instructed was to operate it
ad occasion to use it.

ctual occupation and actual user were, in my opin-
sufficient for the plaintiff's purposes in this action,
the fact been that the defendants the Morton
had really no title whatever to either factory or
See Bacon v. Dawes, 3 Times L. R. 557.

ese reasons I think the appeal of the defendants the
eneral Trusts Corporation should be allowed and
dismissed as against them, both with costs; and
peal of the other defendants should be allowed in
educing the damages to $1,500, with costs of the
he plaintiff as if the action had been against the
dants alone; and that there should, as between the
l defendants and the plaintiff, be no costs of this

C.J.O., and MACLAREN, J.A., agreed in the result.

ITH, J.A., thinking there should be a new assess-
amages between the infant plaintiff and defendants
n Co., dissented to that extent, for reasons stated
.

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CARTWRIGHT, MASTER. MARCH 15

CHAMBERS.

RE HUGHES, MAHAFFY v. NICHOLSC

Pleading—Statement of Defence—Motion to Strik —Action to Establish Will—Setting up Prior

Motion by plaintiff to strike out paragraph 6 of ment of defence and the 2nd clause of the prayer

Grayson Smith, for plaintiff.

D. Urquhart, for defendants.

THE MASTER:—The action is to establish a v plaintiff's father made shortly before his death. fendants, in the aforesaid paragraph, allege that a made in April, 1903, was the testator's last will, a the second clause of the prayer to have probate t creed. It appears that on the same day on whicl will was executed the testator conveyed his real the plaintiff, and the defendants have taken proc have this set aside. An order has been made direc two actions to be tried together. It seems clea High Court has no original jurisdiction to gran It is also admitted that if the deed is confirmed th comparatively little for the earlier will to dispos if the later will is set aside. Any proceedings t the earlier will are therefore premature. At the the execution of the earlier will explains the inte defendants in opposing the probate of the later, the plaintiff is sole executrix and legatee, whereas earlier will half the realty and other benefits wer the defendants, who were also made joint execu the plaintiff.

On the argument I referred to a similar case ald v. Park. 2 O. W. R. 455, 492. In view of th and of the facts of the present disputes, it seems b what was done by Sir W. R. Meredith, C.J., and a graph 6 to remain as being useful, if not absolutely to shew what interest the defendants have in the they being only the sisters of testator's wife. But to have probate of that earlier will should be s as was done in McDonald v. Park, supra. This

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hing being done to establish the earlier will until the of the validity of the later will and of the con- eous deed of the realty has been finally determined. osts of this motion will be in the cause.

GHT, MASTER. MARCH 15TH, 1907.
H, C.J. MARCH 19TH, 1907.

CHAMBERS.

GEEDY v. WABASH R. R. CO.

Motion to Change—Place for Trial—Convenience—of Residence of Plaintiffs—Defendants out of the liction.

n by defendants to change venue from St. Thomas to

Rose, for defendants.

Spence, for plaintiffs.

MASTER:—It is admitted that the plaintiffs all re- he county of Norfolk where the accident occurred the action is brought. It is also not denied that dants are a foreign corporation, having their head the United States, but having running powers over e tracks of the Grand Trunk Railway Company and themselves of the services of the officials of that The writ of summons was issued out of the ffice of the High Court, and served on the defend- nt at Simcoe.

ext sitting at Simcoe is fixed for 2nd April, and t. Thomas for the 22nd of that month.

is no question here of preponderance of convenience, other respects it was urged that it seems "emin- ase for trial at" Simcoe, to quote the language of A., in McDonald v. Park, 2 O. W. R. 972. It was ed that the expense of a trial, which ought prima be borne by the county of Norfolk, should not be Middlesex, without some other reason than the the plaintiffs, for which no sufficient explanation ven.

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It was further contended that this case com
decision of the Divisional Court in Saskatchew
Investment Co. v. Leadley, 9 O. L. R. 556, 5 (
This was what was mainly relied on in support (
This case, however, was distinguished by Mr. S
ground that here there are no defendants re
province, and that it cannot make any differen
way company whether the action is tried at on
other.

I inclined at first to the opinion that the
go, as Simcoe seems the natural place of trial.
consideration and a careful examination of the
case has led me (not without great reluctance)
site conclusion. That case went on the grou
the plaintiff company and the defendants the
resident at Toronto, where the cause of actio
late Mr. Justice Street, 9 O. L. R. at p. 561 (9
language which is only applicable to the case
resident in the province who ought "not to be
go away from their county to try local actions
ceptional cases." He also thought there was
ponderance of convenience in favour of Toro

Here the only defendants are non-resident
katchewan case does not apply, "because as to
not within the jurisdiction at all, the place of
comparatively unimportant:" per Street, J., s

Motion dismissed; costs in the cause.

(Affirmed by MEREDITH, C.J., 19th March,
prejudice to an application to change the ve
ground that defendants cannot obtain a fair
Thomas.)

FALCONBRIDGE, C.J. MARCH

CHAMBERS.

LIDDIARD v. TORONTO R. W. C

Costs—Taxation of Defendants' Costs against P
fendants' Solicitor Paid by Salary.

Appeal by plaintiff from taxation of costs
by the junior taxing officer at Toronto. Upon

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nts' costs it was admitted that defendants' solicitor
y an annual salary, and that under an agreement
he solicitor and the defendants the solicitor was
retain for his own use any costs which he might
m litigants. Upon this state of facts the plaintiff
that the defendants could not recover more than
ents. The taxing officer overruled the objection,
aintiff appealed.

Middleton, for the appellant. Apart from statute
II. ch. 12, sec. 15, it is clear there can be no re-
arvis v. Great Western R. W. Co., 8 C. P. 280.
legislature did not intend to interfere with this,
lain by contrasting the provisions of the statute
rovisions of the Municipal Act, sec. 320, sub-sec. 3,
1881 in consequence of the decision applying this
unicipalities: Stevenson v. City of Kingston, 31
. This is made still plainer when it is seen that
ent in question is an added sub-clause to sec. 54 of
tors Act, which merely relates to conveyancing,
it plainly applicable to the rights as between soli-
client, and shews that it was not intended to inter-
the client's rights as against adverse litigants:
ason, 16 P. R. 25.

Strathy, for the defendants. The statute was un-
passed with the intention of changing the law,
the duty of the Court to give effect to what must
the intention of the legislature, and not to so inter-
ute as to make it entirely nugatory.

NBRIDGE, C.J., allowed the appeal, acceding to the
of plaintiff's counsel.

IDGE, C.J. MARCH 15TH, 1907.

CHAMBERS

DIXON v. GARBUTT.

—Counterclaim — Alternative Claim — Postponement—Premature Motion.

by plaintiff from order of Master in Chambers,
dismissing motion for particulars of counterclaim.

dlaw, K.C., for plaintiff.

Middleton, for defendant.

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FALCONBRIDGE, C.J., dismissed the appeal w
defendant in any event.

FALCONBRIDGE, C.J. MARCH

WEEKLY COURT.

DOWNEY v. DOWNEY.

Will—Devise—Misdescription of Lands—Declar
ment.

Motion by plaintiffs for judgment on the p
an action for a declaration that certain lands pa
devise contained in a will, though misdescribed.

The testator devised to Alfred 65 acres part
the 1st concession; he owned 65 acres part of lo
1st concession; he also owned the south-west qu
14 in the 1st concession, 50 acres. He devised t
acres part of 13 in the 1st concession; he did n
part of lot 13.

The declaration sought was that the 65 acr
were devised to Alfred and the 50 acres of lot 14

M. H. Ludwig, for plaintiffs, the devisees.

F. W. Harcourt, for infant defendants.

The adult defendants consented to judgment a
plaintiffs.

FALCONBRIDGE, C.J.:—It does not seem to be
reconcile the 7 or 8 decisions on this question pr
the last 25 years. There is no case exactly like
one. The testator shews his intention to dispos
property, and there is no residuary devise, and I
opinion that judgment ought to go as asked.

Of course I exclude from consideration the
the draftsman as to the testator's intention.

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J. MARCH 15TH, 1907.

TRIAL.

v. HAMILTON AND DUNDAS STREET R. W. CO.

—Fatal Accidents Act—Action by Married Woman Death of Aged Father—Reasonable Expectation of niary Benefit from Continuance of Life.

on by a married woman, aged 47, the only child of e B. Fairchild, who was killed by the negligence of its, to recover damages for his death; the action ought under the Fatal Accidents Act.

Washington, K.C., for plaintiff.

. Nesbitt, K.C., for defendants.

ELL, J.:— . . . The deceased was . . . 73 age, and had until a few months before his death otel keeper, but he had sold out his hotel, and there- l his death had boarded with his daughter, the plain- ing nothing for his board. During the 4 or 5 years is death he had given plaintiff about $1,000, and when out his hotel he gave her $4,000 more. He left a will plaintiff became entitled to all his estate, some with the exception of two trifling legacies. He seems ving with his daughter to have been engaged in an n for the cure of rheumatism by electricity. His aw also says that the deceased was not content to re- le—"he wanted to go in with me in the coal busi- hey were at preliminaries, but no agreement had been . An ice business, it would appear, was intended or of, to be combined with the coal business, but the such a business being started had not arrived. No is given as to the proposed or suggested extent of siness or what profit might be expected to be derived m.

n a motion for a nonsuit, I reserved my decision, and went to the jury, plaintiff claiming on two grounds, trical invention and business chances. The jury hat plaintiff was not entitled to any damages in re- the invention, but awarded $2,000 "for business "

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I am now to dispose of the question of
"invention" may be disregarded; and the sole
considered is, "Is it open to a jury to award d
such circumstances as these, for 'business ch

Much has been written upon the princ les
an action of this kind: and I think the followi
represent the state of the authorities: "It wa
the Act to give compensation for damages susta
to enable persons to sue in respect of some imag
and so punish those who are guilty of negligen
them pay costs:" per Pollock, C.B., in Duck
son, 4 H. & N. 653, 656.

"If no pecuniary damage is proved, defen
titled to the verdict:" Pym v. Great Northern
B. & S. 759, 4 B. & S. 396.

That such pecuniary damage may be proved
reasonable expectation of pecuniary advantage
tive's remaining alive . . . and damages m
respect of that expectation if it be disappoi
probable pecuniary loss thereby occasioned:" D
Eastern R. W. Co., 4 C. B. N. S. 296; Pym v.
ern R. W. Co., supra.

That in determining this reasonable expecta
to be considered (if there be no legal liabilit
ceased towards the plaintiff) the conduct of th
the plaintiff, "the benevolent intent," and also
lity of the deceased being in a position to exerc
volent intent. But "a jury certainly ought n
guess on the matter:" Franklin v. South Easte
3 H. & N. 211, per Pollock, C.B., at p. 214.

[Reference also to Mason v. Bertram, 18
4, per Proudfoot, J.; Hull v. Great Irish North
(1890), 26 L. R. Ir. C. L. 289, per Palles, C.
Davidson v. Stuart, 14 Man. L. R. 74, 22 Oc
Occ. N. 113, 34 S. C. R. 215; Stephens v. Toron
11 O. L. R. 19, 6 O. W. R. 657.]

Of the two elements, viz., a desire to benefit
the reasonable probability of so doing, I think t
evidence of the former. The latter is more diffi
If I were at liberty to apply my knowledge of
ters, I should say that it is vastly more probabl
of 74, who had his mind occupied with an inve
that described, would be vastly more likely to los

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—that if he did go into business on the lines sug-
would much more probably lose all he had than
e—and that it was much more likely that he would
burden to his daughter than that he would be able
her pecuniarily. And it seems to me, without
such knowledge, but considering simply the facts
hat a man of 74 had gone "clean out of business,"
ut his business, was living with his daughter with-
g his board, was simply talking about going into
usiness, with nothing to shew the probability of
business being a success—that it would be allowing
o make it "a mere matter of guess work" to allow
ssess damages for the death. And it is not to be
that plaintiff benefited pecuniarily by the death of
—and this again introduces the element of "guess-
conjecture as to whether, had he lived, he would
n her the benefit of the money he actually had.

e whole, I am of opinion that I should allow the
r a nonsuit.

. MARCH 15TH, 1907.

TRIAL.

E MINING CO. v. TEMISKAMING AND NOR-RN ONTARIO RAILWAY COMMISSION.

l Minerals—Crown Grant of Mining Lands—Con-on—Reservation of Railway Right of Way—Evid-Description—Plan—Actual Exception of Strip of nd not mere Easement—Title—Declaration.

against the railway commission, the Right of Way
o., and certain individuals, for an injunction and
f in respect to the mining rights upon a strip of
he Cobalt district.

Watson, K.C., and J. B. Holden, for plaintiffs.

Thomson, K.C., for defendant railway commission.

Middleton, for defendant company.

Fraser, K.C., for the individual defendants.

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MABEE, J.:—The question involved in this
title to a portion of the land occupied by the
and Northern Ontario Railway and the mineral
surface.

Plaintiffs allege that they hold the paper t
to enjoin the Right of Way Mining Co. from
or mining on the strip in question—the latter co
ing title through the railway commission.

On 29th September, 1903, Fred. La Rose
grant, under the provisions of the Mines Act, 1
ch. 36, of a mining location consisting of 40 a
less located opposite station 113 on the Ontari
kaming Railway, and attached to the applica
affidavit that on 15th September valuable mine
discovered on this location. The receipt of t
acknowledged by the assistant commissioner on
On 19th November the assistant commissioner
Rose asking for a sketch shewing the position of
and enclosing a sketch shewing the location o
along the north shore of Long lake. A sketch
prepared by J. H. Shaw, the surveyor engaged
survey for the discoverer, and also a descript
and bounds. This latter states the lands to
location, designated as J. S. 14, containing by ad
36 95-100 acres more or less; then follows a d
metes and bounds commencing at a point at th
angle and describing a square of 20 chains, ex
south boundary is two links short, and retu
place of beginning. This description covers 40
ground. It then proceeds as follows: "Excep
serving therefrom the right of way of the Tem
Northern Ontario Railway, which right of way
particularly described by the located centre
lows, that is to say, commencing at the interse
centre line with the north boundary of said lo
point is 10 chains and 52 links from the aforesa
angle of said location measured east along said
ary, thence south 28 degrees and 36 minutes w
thence on a 6 degree course to the right 349 feet
to the west boundary of said location, said right
99 feet wide (49 feet 6 inches on east side o
line measured at right angles) and produced
boundaries mentioned; said mining location is sh

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l said right of way is shewn coloured green on plan ," etc.

ketch or plan filed clearly shews the railway lands running through the 40 acre tract, and on either e railway the 36 95-100 acres are coloured pink.

nd June, 1904, a mining lease was granted to La Rose g location J. S. 14 as shewn on plan of survey (the ioned) containing by admeasurement 37 acres more serving 5 per cent. of the acreage for roads, and also the right of way of the Temiskaming and Northern Railway, being 49½ feet from each side of the centre ssing through the said location.

se assigned his interest in the lease and lands covered McMartin et al., and that assignment refers to the n and mentions the lands as being 37 acres more or 25th May, 1905, a Crown grant issued to McMar- which purports to convey location J. S. 14 as shewn naw plan and covered by the lease to La Rose, and ving the 5 per cent. for roads and the Temiskaming thern Ontario right of way, in terms practically those reservations in the lease. The lands by fur- sfers were vested in plaintiffs, the reservations ap- s in the above mentioned documents, and the cer- f ownership issued from the Land Titles office also the reservation for right of way.

tiffs allege that these documents shew title in them acres, subject only to the railway commission being o lay their tracks upon and use the surface of the or a right of way. It appears that when the Crown ued, McMartin et al., the grantees, paid for only 37 land. It was contended that under the Act at that ining location could not consist of less than 40 acres, the reference in the descriptions to mining location meant 40 acres. I do not think so. Reading the n the description of the lands applied for, it seems plain for argument to the contrary that what was ed for and conveyed was the 37 acres shewn in pink plan, and I am of the opinion that no other lands an the 37 acres so coloured, and that the intention ppears to except or reserve the 3 acres coloured green. construction seems to me possible.

e the statute provided that mining locations should be in a certain manner (R. S. O. ch. 36, sec. 26, sub-sec.

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1), there is nothing in the statute to prevent making further additional reservations to that in sub-sec. 4 of sec. 26, and, while La Rose appl acre tract, his title deeds shew that only 37 acres to him. The contention that the grant must be 40 acres with a reservation of surface rights, or to pass over or use the surface of the 3 acre s railway, cannot, I think, prevail. The descrip lands asked for, prepared for the applicant, as plan, bears the opposite construction. I do not t of way," as used here, means a mere easement larger meaning of the strip of land forming the adjacent portions to the railway fences. At t application was made for the grant, the railway h veyed, there were stakes along the centre line, ar cation locates the discovery as opposite station line of railway. The applicant knew that the be constructed along that survey. Of course the some deviation. He made his application with ref road, and it seems absurd for him to contend tha either intended to grant or did grant to him a interest in these railway lands, and that a clear reservation of them was not made.

The title to the 3 acre strip in question was by order in council and statute confirming it, w railway commission, which granted to the indivi ants, who in turn granted to the Right of Way Much argument was had upon these subsequent but, in my view, they are immaterial, as plaint tirely in making out a title in themselves to the and that is fatal to their case. Were it necessary I should be compelled to hold that the Act 6 Ed 12, sec. 2 (O.), destroyed any vestige of hope pla have ever had of obtaining any relief upon the fa them. The writ of summons in this action wa 2nd May, 1906; application had been made up for a fiat for leave to add the Attorney-General defendant to these proceedings, which had not b before the writ issued; it was renewed the sam and on 3rd May was refused. Chapter 12 abov was assented to on 14th May. This Act provides i this 3 acres (together of course with all the oth ferred to in the order in council of 24th July,

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in the railway commission as of 17th March, 1902, in
nple, with all the mines and minerals under the lands
mining rights therein absolutely, freed from all claims
mands of every nature whatsoever in respect of or aris-
om any lease or patent of any mining lands or mining
n at any time granted. This Act, following as it did
ck haste upon the presentation of the claim by plain-
as plainly intended to end matters. . . .

. Watson advanced many able and ingenious arguments
aintiffs, citing the sections of the Ontario and Dom-
Railway Acts as to railway lands not carrying mines or
ls, sections of the Surveys Act, the Mines Act, the
Lands Act, the Act establishing the Temiskaming and
ern Ontario Railway Commission, and the various
ments thereto; but it is apparent that these cannot
e the rights of plaintiffs if I am right in holding that
acre strip was never covered or intended to be covered
grant.

m impressed with the importance of the case to plain-
This 3 acre strip cuts their location into two separate
, necessitating to a large extent duplicating their
plant. . . . They are advancing the claim in
aith. But, of course, this cannot make a title for them.

ion dismissed with costs.

N, J. MARCH 15TH, 1907.

TRIAL.

HENES ELECTRIC CO. v. ROYAL TRUST CO.

t—Construction—Provision for Cancellation — Right
dministrator under— "Assigns" — Lease — Partner-
.

n for a declaration that defendants had broken a con-
ted 10th May, 1902, made between plaintiffs and one
t. Jacques, deceased (of whose estate defendants were
trators). for the supply of electric current to the

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Russell House, in the city of Ottawa, and for such breach of contract.

G. F. Henderson, Ottawa, for plaintiffs.

J. F. Orde, Ottawa, for defendants.

ANGLIN, J.:—The contract, which purports parties hereto, their respective heirs, executors tors, successors, and assigns," requires plaintif and St. Jacques to take and pay for, at stipulat a period of 10 years from 1st May, 1902, electr the lighting and certain other services in co the Russell House, an hotel in the city of Otta the following proviso, to determine the construct of which this action has been brought:—

"Provided that if, after the expiration of 5 y said 1st day of May, 1902, the said party of th (St. Jacques), his heirs, executors, administrato is neither owner, nor tenant, nor occupier of t whether by himself or together with another o either party shall be at liberty to cancel this co ing notice in writing to the other party."

It is conceded that, if entitled to the b proviso, defendants have given a good and su of their intention to terminate this contract 1907.

For the purposes of this action it is agreed is to be treated as if the 1st May next had ac and defendants had refused longer to permit perform their contract, and had repudiated thereunder. The question presented is whe sent occupants of the Russell House are F. X. St. Jacques, within the meaning of the proviso.

Upon the admissions of counsel and adduced, I find the following facts:—

In May, 1902, F. X. St. Jacques was Russell House for a term which would expire 1907. He carried on a hotel business, of wh the goodwill. He also owned the furniture hotel, and held the license. His lease cont vision for renewal.

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ing to dissatisfaction with his conduct, the lessors it known to St. Jacques prior to March, 1904, that uld not obtain a renewal of his lease. St. Jacques negotiated with the Messrs. Mulligan, with the result e entered into a partnership with them on 1st March, for a term which should expire on 1st May, 1912. The rship articles declare that the capital of the partner- hall consist of "the said liquor license and the said ure, supplies, and tenant's fixtures," in which St. es sold to the Messrs. Mulligan, for $50,000, a one- nterest. The management of the hotel was to be in the hands of the Messrs. Mulligan. Before making greement, the Messrs. Mulligan had received from ussell Hotel Co., owners of the Russell House pre- some assurance that a 5 years' renewal of the St. es lease would be granted either to the partnership themselves, on terms somewhat more favourable. e partnership agreement it is provided that the rs shall endeavour to "obtain a renewal of the said for a further period of 5 years, and such renewal be for the benefit of the said partnership." The ct with plaintiff is not referred to in the articles of rship.

X. St. Jacques died on 21st December, 1904, te. Defendants were appointed administrators on March, 1905. The Messrs. Mulligan continued to on the hotel business. An action for winding up the rship ensued. This resulted in an arbitration being nder the provisions of the partnership articles. efore any award was made defendants and the Messrs. an reached an agreement embodied in an instrument 16th May, 1906. This agreement provided for the se by the Messrs. Mulligan of all the right, title, nterest of the administrators in the goods, chattels, nery, plant, furniture, business, stock in trade, effects, debts, rights, credits, and assets of the partnership of cques and Mulligan. The Messrs. Mulligan assumed e debts and liabilities of the partnership, and the of all contracts and obligations of or taken over e partnership, save and except the contract with ffs. . . . As to this contract, the agreement s a special provision, by which the Messrs. Mulligan liability for payments thereunder up to 1st May,

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1907, the administrators covenant to give th
quired by the proviso for terminating the cont
date, and thereafter undertake to indemnify
Mulligan against all liability in respect thereo

Plaintiffs have continued to supply elec
under their contract down to the present t
Russell House, and have been paid therefor by
ship during its existence, and latterly by the
ligan. Mr. George E. Mulligan states that
Mulligan expect to receive a lease from the R
Co. for a further term of 5 years from 1st Ma

For plaintiffs it is contended that the Mess
are now, and will be under the new lease, wh
to receive from the Russell Hotel Company,
occupiers of the Russell House as "assigns"
Jacques, inasmuch as they have acquired his
license, &c., &c. Mr. Henderson also maintai
are and will be assigns of his rights as lesse
defendants Mr. Orde argues that "assigns" in
in question means assigns of the contract itse
rights of F. X. St. Jacques thereunder, and tha
Mulligan are not such "assigns."

In my opinion, the view preferred by th
is right.

The parties were providing for the case i
persons who might at the expiration of 5 year
tenants, or occupiers of the Russell House shou
F. X. St. Jacques, nor his legal representati
person entitled to claim the benefit of the
assignee from him of such right. The righ
was in that event made reciprocal. If the co
prove highly advantageous to the purchaser o
current, the vendors were not to be compellabl
to supply it at the behest of St. Jacques or his
sentatives or the assignees from him of his contr
unless he or they should be actually tenants or oc
Russell House premises. On the other hand, if
should turn out to be very beneficial to the ven
respondingly onerous to the purchasers, neither
nor his personal representatives, nor any person e
benefit or subject to the burden of the contra
signee thereof should be compellable to contin
the supply of electric current to the Russell H

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y owner, tenant, or occupier thereof. The word "as-
so read is given full effect. Such is its prima facie
g: Friary Holroyd and Healey's Breweries Ltd. v.
on, [1899] 1 Ch. 86, 90. I see no reason for endea-
to put upon it any other, especially when neither
text nor anything in the surrounding circumstances
n in evidence requires or even indicates that any other
g was intended by the parties to the contract. On the
y, the word "assigns" is found in several other places
contract in such collocation that it almost necessarily
assigns of rights, etc., created by the contract itself.
ct goes far to corroborate the view that such is its true
g in the proviso for cancellation: Lord Dynevor v.
t, 13 App. Cas. 279, 286, 290.

reover, if the word "assigns" in this proviso means
rees of the business, etc., it is difficult to understand
exercise of the option to cancel was restricted by the
on that such transferees should be owners, tenants, or
rs of the hotel. It is extremely improbable that it
be anticipated that transferees of the hotel business
be neither owners, tenants, nor occupiers of the hotel
s. As transferees of the business the Messrs. Mulli-
not "assigns" of St. Jacques, within the meaning of
viso under consideration.

as assignees of the lease, if they should be such after
next, would they, in my opinion, be "assigns" under
vision. But upon the facts admitted and proven as
t out, though they may be and probably are assignees
ease up to 30th April, 1907, taking under a new lease
at date not made pursuant to any covenant or stipu-
or renewal in the lease held by St. Jacques when the
es contract was entered into, they will not, after 1st
xt, hold the Russell premises as assignees of the former
St. Jacques.

ough the partnership articles did not perhaps cover
rest of St. Jacques under the Deschenes contract, all
appear to have proceeded upon the understanding that
tnership, while it subsisted, should enjoy any advan-
hich that contract conferred, and should discharge any
ons it imposed. The agreement between the Royal
Company and the Messrs. Mulligan makes this reason-
ar. But the same agreement—which must be taken as
—also shews that the Messrs. Mulligan have not be-

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come assignees of the rights of the St. Jacques c
contract with the Deschenes Electric Company
Portal, [1902] 1 Ch. 727; Bryant v. Hancock, [18
716, [1899] A. C. 442.

It follows that defendants are entitled to take a
the proviso for cancellation in the contract wit
The action therefore fails and will be dismissed w

RIDDELL, J. MARCH

TRIAL.

MORITZ v. CANADA WOOD SPECIALT

Foreign Judgment—Action on—Judgment Recov land against Defendants in Ontario—Ju Breach of Contract—Place of Performance— Shipped from Canada to England—Place of Alternative Claim on Original Cause of Actio —Assignment of Claim—Partnership—Exec ties.

Action to recover the amount of a judgment
Emanuel Moritz in England against defendants
alternative to recover damages for breach of con
was the cause of action for which the English ju
obtained.

K. Martin, Hamilton, for plaintiff.

R. D. Gunn, K.C., for defendants.

RIDDELL, J.:—In June, 1900, the plaintiff, L
an uncertificated bankrupt, was manager for
Emanuel Moritz, who carried on business in L
land, under the name of "E. Moritz," as a fo
importer. The defendants were manufacturers
specialties in Orillia, Ontario, and had agents
Podmore, & Co., in London. The plaintiff, as su
gave an order to defendants, through their agents
dowels and other goods, which order defendants
cable to their agents 18th July, the acceptance
firmed by letter of the same date. Thereupo

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act was drawn up and signed for defendants by their s. No question is raised as to the authority of the s to sign the precise form of contract proved. Defen- admittedly failed to carry out their contract, where- Emanuel Moritz made an application to the High Court ustice in England for leave to issue a writ of summons ervice out of the jurisdiction. This application he sup- d by an affidavit made by himself, in which he swore the contract "provided that the dowels and other goods to be delivered to me in London, and payment for the was to be made in London aforesaid in exchange for ing documents." An order was made by Jelf, J., in nbers, allowing the issue of a writ as asked, and the writ accordingly issued, tested 9th October, 1902. No ap- nce having been entered, after interlocutory judgment fault of appearance, and a writ of inquiry to the sheriff e county of London and assessment of damages thereon, judgment was entered for £369.9.6 damages and £37. costs, on 15th December, 1902.

ionel Moritz having obtained his certificate of discharge 27th June, 1903, he and his father entered into part- ip articles under seal dated 27th July, 1903, but to in force as of 1st July, 1903, whereby all the assets of usiness of E. Moritz, as they existed on 1st January, became the property of the firm and were to belong to artners in equal shares.

n 1st August, 1903, a writ was issued out of this Court Emanuel Moritz as plaintiff and the present defendants fendants, and a statement of claim filed which set out ontract, breach, loss by plaintiff of trade profits amount- o £369.9.6, and expenditure by him in recovering a nent for the amount, £37.14.2, action in England and nent for £369.9.6 (equal to $1,798.61) damages and 4.2 (equal to $183.64) costs, and claiming these two and interest and the costs of the action. This state- of claim was delivered in November, 1903, and defence eply in the same month.

e manager of defendants at the time the contract was d into and his successor were examined for discovery rch, 1904, and no further proceedings seem to have aken in the action until October, 1904, when an appli- was made on behalf of plaintiff for a commission to e Emanuel and Lionel Moritz, Podmore, and others.

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This was opposed, and in an affidavit in reply I
swore that he was the plaintiff. An order for t
commission to England was made by the loc
Hamilton, and upon an appeal being taken, i
made as to the reason of Lionel Moritz calling
plaintiff, it was found that Emanuel Moritz had
March, 1904. Thereupon an order was made o
ary, 1905, by Street, J., allowing all proceeding
tion "to be amended by substituting for the
plaintiff the name of the said Lionel Moritz, ei
as trading under the name, style, and firm of Em
or the name of the said Lionel Moritz alone or
aforesaid, along with the names of the executor
Moritz; such amendment to be conditional up
consent in writing of such plaintiff or plaintif
tuted, and the payment to the defendants of the
application to amend, the election to proceed in
ways and the amendment of the proceedings to b
in 6 weeks from the date hereof; in default of
ment within such time, the motion to amend
missed with costs to be paid by the said Lionel M
time was, on 10th April, 1905, extended to 15th
The election was made, and the writ and other
are now styled as follows: "Between Lionel M
under the name and style of Emanuel Moritz,
The Canada Wood Specialty Company, Limited,
It is to be remarked that this is not literally in
with the order—"Emanuel Moritz" being use
"E. Moritz"— and it appears that the real styl
is "E. Moritz," and not "Emanuel Moritz."

An amended statement of claim, which ha
28th March, 1905, under the order of 3rd Feb
was on 12th April, 1905, filed under the order o
1905, which is the statement of claim upon the
cord. This sets out: (1) that plaintiff carries
under the name, style, and firm of Emanuel Mor
Emanuel Moritz on 20th July, 1900, entered int
with defendants, setting out the terms; (3) k
defendants of purpose for which the goods were
(4) breach; (5) refusal of defendants and aban
them of the contract; (6) damage by loss of trad
costs in recovering judgment; (7) action in En
(8 and 9) judgment in that action: (10) non-pay

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ts; (11) partnership between Emanuel Moritz and f; (12) death of Emanuel Moritz; (13) bequest by el Moritz of all his interest in the business to plaintiff. aim was for the same two sums as before.

amended defence denies everything except that de- ts are an incorporated company, and specifically denies ged partnership, says defendants never made any con- ith plaintiff or with Emanuel Moritz, pleads sec. 4 of tute of Frauds, that they had no notice of any assign- o the firm, that the assignment is void in law; and e judgment sued upon was recovered (if at all) in a entirely without jurisdiction and by fraud and false ny of plaintiff, and in the absence of defendants.

reply sets out that defendants are a British corpora- d subject to the jurisdiction of the English Court, at they were personally served with the process upon judgment was recovered. . . .

the evidence consists in admissions, chiefly contained t has been said, and in the documents filed. These ents shew, in addition to the facts already set out, that will of Emanuel Moritz, Lionel was bequeathed abso- all property, estate, and effects, "if he shall have ob- his discharge in bankruptcy," and provided that he make certain provision for his mother and sisters, the ving been executed in March, 1901. It also appeared deed of 23rd January, 1905, a release was executed se for whom a provision was to be made by Lionel ; and that in March, 1905, the executors of Emanuel by deed conveyed to Lionel Moritz "all the share and of him the said Emanuel Moritz, deceased, in the siness and the goodwill thereof, and all moneys, cre- d effects belonging thereto."

intiff before the death of his father having obtained tificate in bankruptcy, and the executors having as- to the legacy, it would appear that plaintiff is now entitled to all the partnership assets, even if that were y to enable a surviving partner to sue in the firm r his own. When I add that a consent is filed, dated rch, 1905, by Lionel Moritz, consenting "to be added plaintiff in this action;" that the consent of the exe- o be added as parties defendants has been obtained; t, upon inquiry being made by the Ontario solicitors

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from the solicitors in England as to the assertio
Moritz that he was the plaintiff, the following
written by the English solicitors on 23rd Decer
. . . "Emanuel Moritz was the sole propri
business until 22nd July, 1903, when he took his
Moritz into partnership, the style of the firm rer
Moritz' as before; Emanuel Moritz died on 1st M
by his will leaving the business to Lionel Moritz
partnership the sole partner being Emanuel Mor
tion was rightly brought in his name, and the i
of a partner would not affect the action . . .
a copy of this letter was sent to the solicitor for
before the amendment was made in the proceed
action—I think I have set out all the facts nec
conclusion.

It will be seen that the action is in the alterna
not so expressed specifically. The facts set out i
ment of claim, if proved and sufficient in law, w
a judgment upon the ground (1) of the English
or (2) damages for the breach of the contract. T
sider separately.

The validity of the English judgment depend
law of England; and that, though it may be a
fact, and therefore should in strictness be prove
testimony, I am by agreement of all parties to
from the available authorities.

The extra-territorial jurisdiction of an Englis
cept in certain cases not of importance to conside
not known to the common law; and it was after
unsuccessful attempts to make the practice of out
able in such cases that the Common Law Proced
1852 for the first time gave the Court jurisdictio
not within the territory. The provisions for ser
the jurisdiction have been now crystallized in th
Court of Judicature Act in Order XI., Rule 1 (
and, as the jurisdiction is purely statutory, the
must be considered strictly.

The sub-section relied upon is as follows: "(e)
is founded on any breach or alleged breach withi
diction of any contract, wherever made, which a
the terms thereof ought to be performed within
diction . . . ."

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each indicated in the affidavit upon which the order
ue of the writ was made is the omission to deliver
in London. The contract, however, provides for
board at Montreal or Portland, so that the affidavit
If the validity of the order for the issue of the
the jurisdiction of the Court depended upon the
e affidavit, I should hold that the judgment was
Mr. Gunn argued that the fact that the English
misled by a false affidavit to assert jurisdiction
und for holding that no jurisdiction existed, and
fore, the judgment could not be sustained. I do
in that contention. Whatever right this might
dants to apply to the English Court to set aside
ent—and that is more than doubtful (see Reynolds
, 36 Ch. D. 453)—it seems clear that the validity
gment depends not on the truth of the allegations
h the Court was induced to exercise jurisdiction,
whether, the facts being properly alleged and proved,
had jurisdiction in fact: Reynolds v. Coleman,
Piggott on Foreign Judgments, p. 129.

uestion then to be determined is: "Was there a
the contract in England?" It is not necessary
hole of the contract should have been intended to
ed in England. . . .

ence to Rein v. Stein, [1892] 1 Q. B. 753, 756,

ot necessary that the contract should set out in ex-
s that the performance is to be in England; and it
if it appears from a consideration of the terms of
ct and the facts existing when the contract was
it was intended to be performed within the juris-
Reynolds v. Coleman, 36 Ch. D. 453, especially per
J,. at p. 464.

ntract here provides for the goods to be loaded at
or Portland. The other provisions of importance
he prices are in Canadian currency all free along-
hip. 4. Shipworn to be provided in due time by
buyers' account at lowest rates they can obtain.
t on receipt of and in exchange for shipping docu-
approved acceptances to sellers or authorized agents'
ble in London . . . 10. Property in goods to
for all purposes, except retention of vendor's lien

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for unpaid value, to have passed to buyers wl
on board. 11. Marine insurance to be covered
amount of invoice and freight advance. Then t
"Shipping documents to be handed to Messrs.
ton & Co. in exchange for payment." This
plained as follows. Thomas Hamilton & Co. v
London who guaranteed the payment of the
goods, and the intention was that the shippi
should be sent by defendants to their agents, S
more, & Co., by them handed to Thomas Ha
upon which the latter would pay for the go
themselves deliver the shipping documents to E
this was actually done in the case of certain
defendants under the contract in question. T
while all defendants had to do with the goods t
to put them on board at the shipping port nam
intention of the contract that the bills of lad
placed in the hands of the buyer in London.
buyer would have been content had the goods
in his name and the bills of lading sent him
so (these reaching him) everything might have
this side of the Atlantic that he could call up
to do. . . . The fact that the provisio
might have been waived by defendants, and th
done on this side of the Atlantic all that the buy
called upon them to do, does not make the
stands any the less one partly to be performe
England. And in saying this I do not at all d
thority of that line of cases which decides that
may be performed either within or without th
the Rule does not apply. Most of the cases are
the judgment of the Divisional Court in Bla
Costume Co., 9 O. L. R. 382, 5 O. W. R. 57.

[Wancke v. Mugren, 58 L. J. Q. B. 514, d

If I am right, it follows that the judgment
Court is good, and I do not think that the
ousted by the circumstance that before defenda
in England a breach of that part of the contr
to have been there performed, they had comm
upon this side of the Atlantic of the part to
formed, nor by the fact that the part to be
England could not be so performed unless and
to be performed here had been performed by t

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the judgment was an asset of the business of "E.
on 11th January, 1903, is clear, as also is the fact
became by the partnership deed of 22nd July,
irm asset of the new firm of "E. Moritz." Upon
of Emanuel Moritz, Lionel Moritz was entitled to
ny claim which the firm had against these defend-
, even if that were doubtful, the assignment made
xecutors . . . makes his position absolutely

oubt, the strictly regular course to pursue would
n, on the formation of the partnership, to amend
gs by making as plaintiffs "Emanuel Moritz and
oritz, trading under the name, style, and firm of
z"—Rule 222 not applying to this firm. Then,
death, the executors should have been added in
Emanuel; and upon the assent by the executors to
y and the execution of the assignment, the name
l alone should have been used as plaintiff. That
e state of the record, and it is a matter of indiffer-
t he is described as "trading under the name and
Emanuel Moritz." That is a matter for himself;
owner of the judgment, and if he desires to make
ider it a business asset of his London business,
nothing to prevent him doing so.

this decision it is admitted that I cannot go into
nce that might have been open in the original ac-
d rightly so; the law has been well settled since
1851: Bank of Australasia v. Nias, 16 Q. B. 717;
on Foreign Judgments, pp. 108, 111, 112.

plaintiff says that if the judgment be held not to
ve, he will still be entitled to recover on the original
action. This is a pure matter of law.

first argued for defendants that the judgment of
ish Court merges the original cause of action, and
ntiff must stand or fall by the judgment. Trevel-
yers, 26 O. R. 430, and the cases there cited, fur-
mplete and conclusive answer to that contention.

the judgment being obtained in the English Court,
Moritz had his judgment there, and his right of
s merged in the judgment there, but he also had
f action upon the contract which he might enforce

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by an action in Ontario. I see no reason why he sho
in an action in Ontario set out all the facts and clain
I do not think it is absolutely necessary (though n
it is proper), after setting out the facts as they ha
set out in this action, to go on and state specifical
the action is in the alternative—especially if the
the same whichever claim be given effect to.

As regards the cause of action—the right which E
Morris had to bring an action in Ontario upon the
contract—it would seem that the right of plaintiff
pend upon (1) whether the cause of action was an
the business of E. Moritz; (2) whether the partnersh
conveyed this to the new firm; (3) whether the will o
uel Moritz and the deed of the executors have th
contended for by plaintiff.

As to the first question, while I have no doubt th
Emanuel and Lionel Moritz thought that the judgm
valid, and that that was the only asset in the p
none the less I think that the right to bring an actio
country in which the defendants would be found,
tainly in the Court in Ontario, was an asset—part
property of the business carried on by Emanuel Mo
Jennings v. Jennings, [1898] 1 Ch. 378, at p. 3
Stirling, J. Such a right of action is property whic
pass, e.g., under sec. 44 of the Bankruptcy Act of 1
Wright v. Fairfield, 2 B. & Ad. 727; Porter v. Very,
93; cf. Hodgson v. Sidney, L. R. 1 Ex. 313; Morgan v
L. R. 9 Q. B. 611.

The second question is a more difficult one. I
seem that as in the first so in this I am to determ
law of England. A contract respecting personal
has no situs or locality: Story's Conflict of Laws,
secs. 354, 355, 362. "Mobilia non habent sequelum;
ossibus inhærent; actor sequitur forum rei; debitæ se
personam debitoris." See the cases cited by Story; a
v. Abdy, 17 Q. B. D. 309; cf. Thompson v. Bell, 3
236. I think that I am bound to find that by the
England such a right of action as this is not in
assignable either at equity or by the statute: May
71 L. T. 869, 14 R. 149, 150. . . . If it is to b
mined what the law of England is, I find as a fact
law of England does not regard as assignable such
of action as the present. . . .

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Reference to McCormack v. Toronto R. W. Co., 8 O. W. 67, 9 O. W. R. 300.]

think, then, that there has been no assignment either Emanuel Moritz or his executors sufficient to enable tiff to sue in his own name. But he is at liberty to as parties plaintiffs the executors of the will of Eman- Moritz (I do not think that the order made by Street, J., ents me giving this relief.) They must be added as es plaintiffs and not as parties defendants, and upon written consent to be filed. Costs will be reserved.

At the request of both parties, I will take evidence and rmine the amount of damages if the action upon the ract can be sustained.

MAHON, J. MARCH 16TH, 1907.

TRIAL.

GARA PENINSULAR POWER AND GAS CO. v. ST. CATHARINES AND NIAGARA POWER AND FUEL CO.

ract — Construction—Supply of Natural Gas—Remedy or Insufficient Supply—Right to Enter upon "Field" of Plaintiffs — Covenants and Conditions of Contract—Injunction—Dissolution—Damages.

ction by an incorporated company having a natural gas in the county of Welland and engaged in developing al gas, against another incorporated company having head office at Hamilton, to restrain defendants from ing upon plaintiffs' natural gas field in the county of nd and from exploring and drilling for natural gas n and thereon, in alleged contravention of a covenant ined in an agreement entered into between plaintiffs efendants.

A. Moss, for plaintiffs.

D. Armour, K.C., for defendants.

ACMAHON, J.:—The agreement, which is under seal and 24th September, 1904, recites that plaintiffs agree to

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supply defendants with natural gas, and for
to lay and maintain an 8-inch pipe line from
to within a mile of St. Catharines, and defend
take from plaintiffs the supply of gas and to
throughout St. Catharines and Merritton, to
300,000,000 cubic feet per year, for the period o
which they agree to pay 15 cents per 1,000 cu
if defendants supply factories in St. Catharin
they are to pay only 10 cents per 1,000 cubic
same.

The covenants entered into by plaintiffs ne
referred to are:—

(1) That plaintiffs will supply to defenda
ously (unless for accident or other unforeseen
for the period of 8 years from 15th November,
natural gas supply they now have and which th
get under their control . . . so long as th
or hereafter developed by plaintiffs produce
livery of gas can be made therefrom.

(3) Plaintiffs will not supply any customer
arines, Merritton, or Port Dalhousie, and will n
any gas to any other company or persons for
of supplying such places or consumers except
fendants agreeing not to explore or drill for or
for their own supply.

Should plaintiffs fail to deliver to defe
period of 3 months during the currency of thi
gas to the extent of 300,000,000 cubic feet pe
such less amount as defendants require for thei
defendants may make a contract with any othe
corporation for the supply of gas required fo
over and above what plaintiffs are ready and wi
ply and do supply from time to time, such ga
chased at a rate not to exceed 20 cents per 1,00
and to be received by and delivered to defe
through the pipe line of plaintiffs, but no su
shall be entered into by defendants without pl
ing been given 2 weeks' notice of the intentio
tract and the proposed price to be paid.

As an additional remedy to defendants an
them to satisfy themselves that they are recei
gas required for their consumers which plain

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upply, and upon plaintiffs alleging that they have ent gas to furnish under the terms of this agree- endants may enter into the field of plaintiffs and asonable steps and make delivery of gas therefrom he pipe line of plaintiffs, plaintiffs according de- all facilities therefor, and in such event the cost ng shall be deducted from the price plaintiffs re- er the terms of this agreement for such gas.

aintiffs hereby agree to and with the parties of the (William Chaplin, of St. Catharines, and all other s to the subscription agreement thereto annexed) (plaintiffs) will, between the date of execution of ment and 1st February, 1905, increase the volume gas they now have in sight in wells, the gas from vailable for delivery to defendants (save as here- provided), to 6,000,000 cubic feet of gas per day l head, in gas their sole leasehold property.

agreement dated 27th January, 1905, the time aintiffs to develop the supply of gas to the extent 00 feet per day, as provided in the former agree- extended to 18th October, 1905.

as field in the county of Welland under lease to was stated to be between 4,000 and 5,000 acres, e time of the agreement of 24th September was to, it had 3 or 4 wells, and at the time of the trial ad been drilled, some of which were dry wells, and ng wells were then existing.

iffs commenced to supply gas under the contract , 1905, but no statement of the consumption of trons of defendants is furnished prior to June, consumption for that month was 7,561,400 cubic . a total of 122,610,633 cubic feet consumed e 8 months from June, 1906, to January, 1907,

. . .

serted by defendants and supported by very cogent that the supply of gas from October, 1906, and , fell far short of what was necessary for defend- umers in St. Catharines, and that a number of ed to be consumers, and removed the burners from aces, and resumed the heating of their premises

. . .

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Mr. P. J. Price, the managing director
. . . stated that the loss of revenue to d
ing each of the months of November and De
was $3,000, caused by reason of an insufficien
by plaintiffs. . . .

It was intended by the "additional reme
the agreement to give defendants the right
tiffs' field and make delivery of gas therefro
pening of either of the following events: (1) s
a shortage in the supply of gas, then, on obtai
sary information which enabled them to sati
that they were not receiving all the gas requ
consumers which plaintiffs can (or) and ought
it may be that defendants to enable them to
selves as to the delivery or want of delivery
could enter the field for that purpose), defend
"all reasonable steps to make delivery, etc.
upon the plaintiffs alleging that they have no
to furnish under the terms of this agreement,
enter into the field and take all reasonable s
delivery, etc.

Counsel for plaintiffs contended that it w
event of plaintiffs alleging that they had not
to furnish under the terms of the agreement t
should enter the field and make delivery, et
argument to prevail, the former part of the cl
defendants are to be enabled to satisfy themse
are receiving "all the gas required for th
which plaintiffs can and ought to supply," w
less. For, although they had satisfied themse
were not receiving all the gas required for th
which plaintiffs could and ought to supply.
means of redress unless plaintiffs alleged that
sufficient gas to furnish under the terms of t
Plaintiffs' covenant is "to supply continuousl
ural gas supply which they now have (or) an
hereafter get under their control, except such a
for supplying the town of Thorold." They m
gas to supply defendants' consumers, which
ought to supply, but do not supply. If tha
defendants on examination to be the cond
then plaintiffs' covenant has been broken, an
are entitled to exercise the rights and remed

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nal remedy" clause gives them. But, on plaintiffs that they have not sufficient gas to furnish under s of the agreement, that of itself entitles defend- ake all reasonable steps and make delivery, etc.

sel agreed that the word "or" between the words nd "ought" must be read "and." It is also ap- at the word "and" after the word "supply" must "or."

was not an express "allegation" . . . that had not sufficient gas to furnish under the terms reement. . . .

ding to the view I have taken of the clause in ques- want of an "allegation" by plaintiffs that they had ient gas to furnish defendants would not deprive r—if there was a shortage in the supply for their s, and if, on the information in their possession, e satisfied that they had not been receiving all the red for their consumers which plaintiffs could and supply—of their right to enter the field and take able steps to make delivery, etc.

intiffs were not supplying sufficient gas to fulfil the I am of opinion that defendants would be entitled or gas in plaintiffs' field in order to provide gas, consumers, and that, I consider, was the design and of the agreement. . . . If the defendants are o enter the field, one of the reasonable steps to take delivery may be the drilling of a well or wells. . . .

rence to Allison v. Bristol Marine Ins. Co., 1 App. 217; Phillips v. Clark, 2 C. B. N. S. at p. 162.]

Ioss urged that defendants, having entered into a not to explore or drill for gas, were precluded from plaintiffs' field to drill. In the covenant entered efendants "not to explore or drill for or procure eir own supply," the word "or" after "drill for" ead "and." The covenant would then read, "not or drill for and procure gas for their own supply." ts could not explore plaintiffs' field, and the latter require a covenant against that being done. "Not " must, therefore, refer to a gas field other than ; then the remaining part of the covenant "or drill rocure gas for their own supply" must also refer eld other than that of plaintiffs. Defendants are

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"procuring gas for their own supply" from pl
under the agreement; so it must be the procur
another field than plaintiffs' that the covenant

The "additional remedy" clause gives an
right of redress to defendants in the event of
the part of plaintiffs to supply all the gas requi
consumers, and it is therefore unnecessary for
the effect of the clause which deals with a fail
tiffs to deliver for a period of 3 months gas t
of 300,000,000 cubic feet per annum, for which
a different remedy may be resorted to by defend
they may make a contract with any other person
for the supply of gas required for their consum
above what plaintiffs are ready and willing to s

There must be, under that clause, not only
deliver to the extent mentioned for a period
but, owing to the peculiar wording of the clause
might be unable to avail themselves of the rem
for a period of a year and 2 weeks. While un
ditional remedy" clause, if plaintiffs are not
the gas necessary for their consumers, defendan
immediate measures to make delivery of the g
wells.

Defendants have established that the suppl
their consumers was wholly inadequate, and th
not receiving all the gas which plaintiffs could
supply. And if sufficient gas was not pump
then existing wells, they could and should hav
other well in order to carry out the terms of th
entered into with defendants. . . .

The action must be dismissed, and the interi
dissolved, with costs. There will be a refe
Master at St. Catharines as to the damages
defendants.

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THE

TARIO WEEKLY REPORTER

(To and Including March 23rd, 1907).

. TORONTO, MARCH 28, 1907. No. 11

RIGHT, MASTER. MARCH 18TH, 1907.

CHAMBERS.

SCAMAN v. PERRY.

—Motion to Change—Preponderance of Convenience Vitnesses—Place for Trial—Terms as to Expenses.

ion by defendant to change the venue from Toronto t Ste. Marie, or to postpone the trial till the autumn .

yson Smith, for defendant.

Henderson, for plaintiff.

E MASTER:—On 5th February, 1906, the plaintiff was g in the defendant's lumber camp in the unorganized ip of Ryan. His right hand was frozen, and he was to go to Sault Ste. Marie to have it attended to. volved a journey of 65 miles, which was made partly sleigh and partly on foot. In the end he had to early all of the fingers of his right hand amputated. intiff remained at the Sault for about three months; de unsuccessful application to defendant personally the expenses paid of his medical and hospital treat- He then left and obtained work elsewhere, and fin- 1st December the present action was begun.

he statement of claim the right to recover is rested neglect of defendant to comply with the provisions dw. VII. ch. 34 (O.), and the regulations of the Pro- Board of Health made thereunder, by reason where- as not able to have his hand properly treated and in

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a reasonable time, as it would have been if ther
a resident qualified medical attendant at the ca

The defendant denies that it was his duty
medical treatment, etc.; that plaintiff's injury is
chargeable to defendant; alleges that it could
avoided by the exercise of ordinary care on plai
and says that plaintiff and the other men refuse
to any deduction as authorized by regulation 12 o
of Health, and threatened to leave if this was dor
they are therefore estopped from any claim a
the absence of a medical man. There are als
fences not necessary to be noted on this motion.

The defendant says he will require, besides
witnesses who reside at the Sault and 3 who ar
siderable distance beyond and who cannot be got
close of navigation except with great difficulty
greater expense. He naturally emphasizes the
plaintiff's injury (which he admits) was suffered i
ship of Ryan, and that plaintiff was at the Sau
three months thereafter.

Plaintiff says he will require 8 witnesses all
Toronto, and one at Montreal, and that they co
to the Sault, losing their present employments.
might be expected, pleads poverty—inability
such a large sum as would be necessary to have
the Sault. His affidavit was made on 31st Janu
has been cross-examined thereon so fully that
tions cover 46 typewritten pages. His whole cas
oughly gone over, and it was agreed that this sho
taken as plaintiff's examination for discovery.
whole account of how the hand was frozen, wha
he made to restore circulation, and of all that
until he left the Sault in May.

He says the witnesses he requires were men
at the camp at the time; but none of them he
give any evidence other than plaintiff himself.

Plaintiff's counsel on the argument concede
main issue is, was there a proper hospital and
tendant provided by defendant as required by th
not, would plaintiff's hand have been saved if
been?

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efendant's counsel admitted that plaintiff had been in-
as he says, and that there was no medical attendant,
e men would not submit to the necessary deductions
their wages.

ie distance of Toronto from the Sault is 546 miles, and
pense of each witness will be at least $30, even if there
delay at the place of trial. This fact has caused me
t deal of difficulty in arriving at a correct conclusion
whether the change should be made.

the one hand is the prima facie right of the plaintiff
rmed in similar cases from Campbell v. Doherty, 18 P.
3, to McDonald v. Dawson, 8 O. L. R. 72, 3 O. W. R.
But in those cases there was no admission of the
of the injury, while here it is as to that self-evident.
also to be remembered that plaintiff remained at the
over three months, so that his evidence must be there.
e other hand, there is the principle on which the
of McDonald v. Park, 3 O. W. R. 812, 972, and Ham-
v. Hodge, 8 O. W. R. 351, 421, were decided. In the
of Osler, J.A., in the former case, the present seems
nently a case for trial at" Sault Ste. Marie. If expert
al evidence is required as to the effect of the absence
doctor from defendant's camp, that can be had there
better than at Toronto, where frozen limbs are com-
vely rare.

ie only point on which it might be necessary for plain-
give other evidence is as to whether the men refused
tribute to the expense of having a doctor. He denies
ie ever heard anything about it. He does not say if
f his 9 witnesses will speak as to this, though in any
uch a large number would not be necessary. It seems
ly likely that such refusal would be any excuse for the
on of a statutory duty, in the light of Fahey v. Jeph-
2 O. L. R. 449, and Billing v. Semmens, 7 O. L. R.
O. W. R. 17, affirmed in Court of Appeal, 8 O. L. R.
O. W. R. 218. It may therefore be doubtful if any
ce is necessary on this point of refusal to contribute.
st be necessary for plaintiff to call the doctors who
ed him at the Sault, and the nurse. If therefore the
ook place at Toronto, he would be at the expense of
ng them here. This will be saved by having the trial
Sault in May.

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Under the special circumstances of this case, I t
order should be made, upon condition that defend
nishes free transportation to plaintiff and one othe
to Sault Ste. Marie and return, if by rail; or for
sides plaintiff if they go by boat—in all say not m
$60. I would suggest that plaintiff give notice of
later than 30th April, so that defendant may arrang
his witnesses on hand, and may make the neces
vances to his solicitor to provide tickets for plaintif
companion or companions.

The costs of this motion will be as usual in the

CARTWRIGHT, MASTER. MARCH 18

CHAMBERS.

ING KON v. ARCHIBALD.

Security for Costs—Motion for, Launched without Inquiry—Solvency of Plaintiffs—Dismissal of Costs.

Motion by defendants for order requiring pla
give security for costs, under R. S. O. 1897 ch. 89.

F. R. MacKelcan, for defendants.

W. E. Raney, for plaintiffs.

THE MASTER:—It was admitted that the moti
not succeed. The only question was as to the cos

The defendant Stephen made the only affidavi
port of the motion. This was prima facie sufficie
on cross-examination he made it plain that the mo
launched without any proper or sufficient inquiries
solvency of the plaintiffs, who carry on, as he
established grocery business at 103 Queen street we
city of Toronto, and keep "a stock of imported
medicines as well as a Chinese beverage which in
means rose wine, and also rice wine, which are use
Chinese in cooking and sometimes as a beverage."

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Ir. Stephen admits that there are between 2,500 and) Chinamen in Toronto, and that the plaintiffs' business going concern and the best of its kind. He also admits he made no inquiries from the plaintiffs as to their fin- l ability, nor did he examine the assessment roll. He admits that for the purpose of doing business with his w countrymen the plaintiffs' stock may be worth $8,000, aintiffs say it is. He relied on what was told him by letectives, and that, I think, was quite insufficient.

'he motion was improvidently made and without any ient reason. It must be dismissed with costs to plain- in any event.

'WRIGHT, MASTER. MARCH 19TH, 1907.

CHAMBERS.

BOUND v. BELL.

of Summons — Substituted Service — Motion by Person Served to Set aside—Practice—Costs.

otion by one Daniel Clark to set aside an order made, e application of plaintiff ex parte, on 10th January, for tuted service of the writ of summons on the applicant, he service made thereunder on 4th February. The ant stated that he was not in communication with de- nt and did not know where he was.

ayson Smith, for the applicant.

A. Moss, for plaintiff.

HE MASTER:—. . . Mr. Smith relied on the deci- f Boyd, C., in Taylor v. Taylor, 6 O. L. R. 545, 2 O. 921, 953, citing Doremus v. Kennedy, 2 Gr. 657. That case where power was given by statute to serve the of an absent defendant. In such circumstances, ser- ould be analogous to that made, e.g., under Rule), and could not be disputed if allowed to pass at the But nothing of the kind is to be apprehended here, o case has been cited nor can any such be found (so

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far as I am aware) where under the facts of a c
present any order has been made setting aside

When an order has been made for substitu
the person served should either forward the d
the defendant; or, if unaware of his residence,
return the papers served to the plaintiff's solicit
his attention to the fact that he is not acting
communication with the defendant, as was done
Barnett, 3 Q. B. D. 183. . . .

In at least one case of this kind the papers
returned to me by the person served, and have
sent on to the plaintiff's solicitor, who is to be
proceed at his own risk, as he may be advised.

In my opinion, the present motion is quite
should be dismissed, but without costs, as sugge
Moss, in view of what was said in Taylor v. Tayl

In an future motion of this nature the ap
not be so fortunate, as all useless and unnecessa
which includes those made through over-caution
discouraged. Reference to the statute 14 & 1
10, on which Doremus v. Kennedy was decided,
where service had been made thereunder it
demed good service "only after the same shall
allowed by the Court, or a Judge in Chamb
would make it proper for any one served as ag
the matter brought before the Court if he di
agency, as the service, if allowed, could not af
attacked, except perhaps on the ground of fraud

CARTWRIGHT, MASTER. MARCH

CHAMBERS.

McILROY v. MILES.

*Parties—Application by Plaintiff to Add a Defen
Disclosed on Application—Leave to Discontin
Costs—Election.*

Motion by plaintiff for leave to add defendan
as a party defendant.

G. S. Hodgson, for plaintiff.

B. N. Davis, for defendant and husband.

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HE MASTER:—The statement of claim alleges that tiff was injured by a team of defendant coming reck- and negligently out of the yard and colliding with a t car in which plaintiff was a passenger. In view of ncontradicted facts set out in plaintiff's affidavit, plain- eems entitled to take such steps as may enable him to er if entitled to do so.

oth defendant and her husband refused to give him any mation before action, and even after services of the writ, who was the owner of the business. On this motion both make affidavits that the husband always owned still owns the business. Under these circumstances, it e for plaintiff to consider whether his better course will discontinue or to join the husband as a defendant.

f he elects to discontinue, he may do so without costs, e principle of Armstrong v. Armstrong, 9 O. L. R. 14, W. R. 223, 301. If he thinks is safer to proceed against he can take out an order to that effect, with costs in ause. This election should be made within a week. edings will be stayed in the meantime.

WRIGHT, MASTER. MARCH 19TH, 1907.

CHAMBERS.

ONTO CREAM AND BUTTER CO. v. CROWN BANK OF CANADA.

ity for Costs—Action Brought by Liquidator in Name of mpany in Liquidation—Liability for Costs — Assets of mpany.

tion by defendants for security for costs.

e plaintiff company were in liquidation. The present was brought by the liquidator under an order of 31st , 1906, of the Master in Ordinary, before whom the g-up was proceeding. The action was begun on 4th and was at issue on 13th December.

Arnoldi, K.C., for defendants.

R. Meredith, for plaintiffs.

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THE MASTER:—The motion is based on the
company are insolvent, and that the liquidato
amined for discovery in November, stated that
consider himself personally liable for costs of
which, if successful, will enure to the benefit
tors of the plaintiff company.

On 8th November last the defendants' soli
this claim upon the plaintiffs' solicitors. But f
explained reason no steps were taken until 12t
stant. That the action is necessarily brought
of the company, and could not have been bro
liquidator alone, is decided by Kent v. La Com
Sœurs de Charité de la Providence, [1903] A.
by Mr. Meredith.

On the present motion the liquidator swea
has in hand assets of the company of more tha
that he believes it will be impossible to make a
tion of the said moneys until this action ha
cluded." . . .

Ontario Forge and Bolt Co. v. Comet Cycle
156, and Boyd v. Dominion Cold Storage Co., i
that a liquidator is not liable for costs of an ac
brought by him in the name of the company, u
party to the record. In all such cases costs wil
for or against a litigating company as in ord
. . .

In re Baden Machinery Co., 12 O. L. R. 634
555, shews that if the defendants here are ult
cessful they can exhaust, if necessary, the wh
payment of costs if given to them against the co
though "this may involve much hardship upon
tor:" 12 O. L. R. at p. 637.

In view of these authorities, it cannot be su
the Master in Ordinary will allow any distribut
while this action is pending. If there is any
thinking such a step is contemplated, the def
apply for protection to the proper quarter.

The motion was admitted on the argument
It seems to be unnecessary, and should be dis
costs to plaintiffs in any event, without prejudice
application on proper grounds.

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RIGHT, MASTER. MARCH 20TH, 1907.

CHAMBERS.

HARRISON v. MOBBS.

Direction for Trial of Action by Mining Commissioner Mines Act, secs. 9, 20 — Jurisdiction of Master in mbers.

ion by plaintiff for an order directing that the action l by the mining commissioner at Haileybury, under visions of the Mines Act, 6 Edw. VII. ch. 11, sec. 9

action was for specific performance of an alleged tract to sell an interest in lands in the Temiskaming There was no alternative claim for damages.

ard Meek, for plaintiff.

IcKay, for defendant.

MASTER:—Two objections were taken to the mo-

t was argued that the application could only be made ec. 20, which has no application in the present case, the provisions of sec. 9 are within the authority of rincial legislature—an important point, which, how- is not necessary to deal with now.

was further argued that in any case the order can- made by the Master in Chambers, as the words or a Judge" in a statute have not the same effect used in the Rules.

n the legislature wishes to give jurisdiction to the n Chambers he is mentioned by name, as in R. S. O. 203, sec. 148, sub-sec. 2, and in the Municipal Act, VII. ch. 19, sec. 219, sub-sec. 2 (O.)

ee with both of these answers to the motion, which dismissed with costs to defendant in any event.

tiff may amend and claim damages, if he thinks he to succeed on a motion to a Judge in Chambers.

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MABEE, J. MARC

TRIAL.

MAYCOCK v. WABASH R. R. CO. AND GR
R. W. CO.

Railway—Collision—Death of Engine-driver—
Rules of Company — Disobedience of Deceas
Death—Action by Widow—Findings of Jury

Action by the widow of Edward Maycoc
driver employed by defendants the Wabash R.
cover damages for his death, alleged to be du
gence of defendants, or one of them.

J. H. Rodd, Windsor, for plaintiff.

H. E. Rose, for defendants the Wabash R

M. K. Cowan, K.C., and W. E. Foster, Mo
fendants the Grand Trunk R. W. Co.

MABEE, J.:—Edward Maycock . . .
Port Robinson on 3rd April last, and plaintif
this action seeks damages for his death. Ma
ceived at Welland Junction an order from th
dent at St. Thomas to run engine 1351 extra
Junction to Niagara Falls; to do this he had
of the Grand Trunk Railway Company as far
inson. There is a contract on foot between t
for the use by the Wabash of certain sections
the Grand Trunk Railway, the conditions a
of which I do not regard it necessary to co
than to say that the section in question is co
contract.

Maycock at Port Robinson collided with a
Grand Trunk Railway, which was then stand
tion of the line of the Grand Trunk not covere
tract between the defendants—in other word
Wabash train off the line of the Wabash, upon
Grand Trunk Railway, and there met the
train. At Port Robinson there is a "gauntlet
double track is laid on the same ties, so of co
west bound trains cannot pass one another at

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llowing "special instructions" appear in the em-
s' time table. "Gauntlet at Port Robinson: about 1,800
f the track between Port Robinson Junction and a
about 300 feet west of the west end of Chippewa Cut
has been gauntleted (the rails of the west-bound
being on the ties of the east-bound track); the use of
ece of track will be governed by semaphores placed
100 yards distant, in either direction from the end of
ntlet. All trains in east direction will come to a full
efore passing these semaphores, and will not proceed
he position of semaphores indicates that the track is
All trains must be brought under full control ap-
ing the gauntlet from either direction, engine and
en keeping a sharp look-out for trains ahead which
e stopped at the semaphore. This will not relieve
of trains stopped by semaphore from protecting the
f their trains in accordance with the rules."

the east side of the Port Robinson station there is a
, so that the train in charge of Maycock after passing
he "gauntlet" should have passed by means of this
over to the south track; the switch was, however, set
e "train line," so instead of Maycock's train turn-
the south track, it kept on in a straight course.
nd Trunk train was waiting on this track going west,
g still, and Maycock ran his engine into this train.
k's duty when approaching the gauntlet from the
defined by the above extract. His duty after passing
he gauntlet is defined by rule 213—"All trains must
ch stations . . . prepared to stop, and must not
d until the switches or signals are seen to be right or
ck is plainly seen to be clear." Then part of the
instructions is: "Train registers are located at the
ng stations, in which trains must be registered in the
r and form prescribed therein . . . Port Robin-
Rule 214: "A train must not . . . pass from a
to a single track until it is ascertained that all trains
hich have the right of track over it, have arrived or
Rule 201: "All extra trains are of inferior class to
ular trains of whatever class."

evidence shewed that Maycock did not stop at the
ore west of the gauntlet: after getting safely over
did not approach the station prepared to stop, nor
stop, or make any attempt to do so; there were lights

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at the switch visible a quarter of a mile to the
that this switch was set against an east-bound
some inconceivable reason he paid no attentio
going rules, nor did he observe the switch l
strongly urged by counsel for the defendant
but I thought the better plan was to let the ju
the facts, and so I reserved the motion.

The jury found both the defendants guilty
because they "permitted laxity on the part
ployees;" that the Grand Trunk Railway C
guilty of negligence in not having the "switch
locked;" that Maycock was guilty of negligen
garding the rules of the companies;" and that,
ing the negligence of defendants, the acciden
been prevented "by having a competent ma
switches and signals, as we regard this place a
son between semaphore at west end of gaunt
at east end of coal shed a dangerous plac
$2,160.

It appears as part of the plaintiff's case, i
the violation of the rules by Maycock, that
head brakesman, instead of being on the to
car, was riding on the engine with deceased;
the rear brakesman, instead of being on top o
was in the van. Marshall, the telegraph operat
he had been in the habit of turning or setting
it was no part of his duty, but he had very fre
it to save the train crews the trouble; that abo
before Maycock's train arrived he had set it
track (so, had it remained as Marshall says he
train would have passed through in safety); th
trains were permitted to pass Port Robinson
ping, but in such cases what one of the witne
as a "skip order" was necessary; that there w
the switch; Marshall said he had had a switch
lost it; that the train in question had passe
about half the time without stopping to regis
the train crews on the Grand Trunk Railway
west frequently turned this switch without an
his office. It was not suggested that Maycock
order."

The train register at Port Robinson was
Turner said the semaphore west of the "gaun

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t it indicated a clear passage, not only over the et, but through the yard and past the station; but it rent that this semaphore relates only to the use of the et, and has nothing whatever to do with what is to e after it is passed. Marshall was an employee of both fendants. The crew of the Grand Trunk train were ployees of that company, and the crew of the Wabash ere in the employ of that company, except that Wool- as permanently in the employ of the Grand Trunk y Company and temporarily on the Wabash train. The eferred to are joint rules relating to the operation of oads.

m of opinion that upon this statement of facts there ing to leave to the jury. Could Maycock, had he sur- have maintained an action for injuries received in uence of this collision? I think when it appeared that sed the semaphore without stopping, then proceeded and past the station building, in the face of the switch being set against him, made no preparation to stop station, passed it, as Marshall thought, nearly 20 an hour, taking his train entirely off the road the h had a right to run over, his case would have been end, and of course his unfortunate widow can stand in her position. It is, I think, apparent that this acci- as caused by the neglect and disobedience of orders deceased; had he been looking ahead, he must have hese switch lights when he was upon or after crossing untlet; had he stopped before crossing the gauntlet, ld in all probability have not been able between there e station to acquire sufficient speed to have put it out power to avoid the accident after he learned he had the switch. Wooliver saw that the train had failed s over to the south track, and, calling to Maycock to wise, jumped from the engine. Maycock at once ap- he brakes, reversed the engine (from what appeared evidence for the defence), remained at his post, and lled—being unable to stay the impetus of the train n that point and the place of collision. This element difficulty might have been eliminated had he come to at the west semaphore: Holden v. Grand Trunk R. , 5 O. L. R. 301, 2 O. W. R. 80.

ink the facts of this case are much stronger against intiff than in Birkett v. Grand Trunk R. W. Co., 35

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S. C. R. 296, where it was held the plaintiff
nonsuited.

In Fawcett v. Canadian Pacific R. W. Co.
721, where the plaintiff had broken the running
suit was held to have been proper. See also I
ston and Pembroke R. W. Co., 4 O. W. R. 18
588.

Assuming that it was negligent not to pro
with a switch key or not to keep the switch
was not the cause of the accident. The defend
right to make rules not only for the protection
but for that of their employees; they have the
these rules obeyed as far as possible by thos
duct they are intended to govern. It is conte
plaintiff that because Marshall had been in the
ting the switch to save the train stopping, and
at least half of these trains had been allowed
out registering, the companies had waived this
In other words, because the deceased had habit
the rules he should be excused. I do not thin
case: Senior v. Ward, 1 E. & E. 385.

There is nothing to shew any knowledge
escence in what it was said was being done by th
dent to bring the case within Northern Pacific
Nickels, 4 U. S. App. 369.

On the contrary, there is high authority
that knowledge of, and assent to, by a superior
by employees of known rules of the company, do
employees from the consequence of such violati
R. R. Co. v. Reesman, 19 U. S. App. 596; Ra
Jones, 95 U. S. 439; Kansas and Arkansas R. F
70 Fed. Rep. 24.

I am unable to see what evidence there is
a finding could be made that this accident
reason of the breach of any duty that the d
either of them owed to the plaintiff, but it see
the contrary, that its direct and immediate ca
observance of the plain rules, well known, it w
the deceased, that the companies had made fo
protection of all concerned.

On the other hand, if the proper view is t
should pass upon the facts presented in the pl

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position do their findings leave the matter? The ing of negligence against the Wabash Company is permitted laxity on the part of their employees; as to the Grand Trunk Railway Company, with the that the switch should have been locked; then the ght the accident could have been avoided, notwith- Maycock's negligence, by having a competent oper- switches and signals, as it was a dangerous place. s no evidence whatever given as to whether that ve been a necessary or proper thing to do, and I ink there is anything in the case upon which such could be upheld; and, even had such evidence been would have been initial, and not ultimate negli- d so I think would have been destroyed by the find- contributary negligence. I think the defendants entitled to have judgment entered in their favour se answers.

leceased seems to have been, until the unfortunate e, a careful and trusted employee, and I hope un- ircumstances the defendants will not ask for costs is widow.

J. MARCH 20TH, 1907.

TRIAL.

CRABBE v. LITTLE.

MOSES v. LITTLE.

d Purchaser—Contract for Sale of Land—Provision ancellation by Vendor if Unable or Unwilling to r Requisitions on Title—Waiver by Attempting to r—Time for Completion of Sale—Statute of Frauds ific Performance.

s by purchasers to compel specific performance by contracts for the sale and purchase of lands in the oronto.

Jennings, for plaintiffs.

Fraser and J. W. McCullough, for defendant.

, J.:—On 16th October, 1906, plaintiff Crabbe offer in writing to purchase from defendants num-

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bers 122 and 124 Spadina avenue, being 32 x
same day plaintiff Moses made a similar offe
116, 118, and 120, in the same street, being
offers were accepted by defendant on 16th C
once became and were regarded by the part
contracts. The documents are in similar form
spects not material for consideration in thes
the clauses in question are the following:
title is good and free from incumbrance; s
examined by me at my own expense, and I
for the production of any title deeds, ab
or other evidence of title, or to have
copies thereof other than those in you
If any objection or requisition is made
you are unable or unwilling to comply w
be at liberty by notice in writing to rescind
without interest. This offer to be accepted
(and irrevocable within that time), otherwise
be allowed 10 days to investigate the title, and
and requisitions not made by me in writing wi
will be deemed to be waived, and if no requ
made within said 10 days, the title will be
accepted as satisfactory. Sale is to be compl
fore the 30th day of October, 1906, on which
of said premises is to be given me, or I am
present tenancies and be entitled to the recei
and profits thereafter. . . . Time shall be
of this offer."

The acceptance signed by defendant, and
foot of the offer, was of "the above offer a
Then followed a covenant by the vendor to
the same according to its terms and conditio

On 26th October very lengthy requisitions
served upon the vendor's solicitor, and produ
documents, some dated as far back as 1817, w
On 30th October the vendor's solicitor wrote
requisitions 2 to 10 inclusive, that, as the ins
more than 20 years old, the recitals were suffi
of the truth of the facts, matters, and desc
No. 11, that a lis pendens was registered in 1
ing further done in the action, it was "son
date;" as to 12, 13, 14, 15, and 17, that the ve
been interfered with in his ownership since 18

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affidavit or declaration as to the matters involved; ling with a discharge of mortgage, was explained. ter also stated that the vendor's title deeds were in citor's possession, and he would be glad to produce r inspection; a draft deed was also enclosed.

1st November the vendor's solicitor again wrote to citor for the purchasers that he had seen his client spect to the requisitions; that the vendor was per- illing to dispose of the property and hand over all deeds in his possession, but that he was unwilling the expense of complying with the requisitions had not been answered;" request was made that he e advised as soon as possible whether the purchasers ccept the title the vendor could give.

5th November the purchasers' solicitor wrote saying nts were quite willing to take the property as soon as e was made satisfactory and the requisitions an- the letter proceeds then to deal with most, if not he matters dealt with in the letter of the vendor's of 30th October, and states that requisitions 18 to t be answered; the statement that the vendor had possession since 1876 is dealt with, and it is pointed t if the vendor intends to make a title by possession more things than mere possession must be shewn; it n suggested, "without prejudice," that the vendor put the land under the Land Titles Act.

5th November this letter was replied to, and in the e vendor's solicitor says his client refuses to go to ense whatever in procuring any additional evidence fy the purchasers as to his title, other than that in ession. An early answer was requested as to whether the vendors had would be accepted, as the tenants n notified to leave, and were leaving, and that if the ers would not accept the title without further evi- he vendor wished to relet the premises to other

he same day plaintiffs called upon the vendor's solici- l it was arranged that the vendor should be asked t the purchasers and their solicitor the following on. The solicitor for the vendor advised his client request, and he came in the next morning and deter- o cancel the contracts. Notice was accordingly pre-

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pared to the effect that, requisitions having be
the vendor was unable or unwilling to comply w
by rescinded the agreements. This was serv
purchasers' solicitor, and the deposits that ha
were repaid. The purchasers' solicitor refus
the money, and stated to the vendor and his s
the notice was served upon him, that there wo
tion over the matter. The money was left u
and when closing his office for the day he pl
vault and it remains there untouched.

The vendor, I find, acted in good faith; h
proper motive in attempting to rescind the con
advised by his solicitor that the expense of co
the requisitions would amount to many hundre
and that, even then, there were matters he cou
evidence upon, and so he was both unable and
comply with the requisitions.

The purchasers were all along relying upo
property, and neither they nor their solicitor,
as is pleaded, "discharged" the defendant from
unless by reason of what took place defendant
right to rescind.

Are plaintiffs entitled to specific perform

The purchase money was not tendered,
mortgage back in the Moses case, but I do n
material, as defendant said after 7th Novem
not have carried out the sales, no matter if
the mortgage had been tendered—he relies so
right to cancel.

Counsel for plaintiffs admitted that defen
right to rescind upon receiving and considerin
tions, if he was unable or unwilling to compl
but contended that by attempting to answer
tions he lost the right to rescind, and could
later on. . . .

[Reference to Tanner v. Smith, 10 Sim. 41
Fry on Specific Performance, 4th ed., sec. 105
Titles, 3rd ed., p. 19; Bowman v. Hyland, 8
Morley v. Cook, 2 Ha. 115; Dart on Vendor a
6th ed., p. 183.]

Upon these authorities I am compelled to
fendant's right to rescind these contracts was

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unications both written and oral after the delivery of equisitions on 26th October. The letter of the 30th with the objections, or some of them, and a draft con-ice accompanied that letter. The letter of 1st Novem-nquires if the purchasers are prepared to accept the title is, and there were interviews between the solicitors, ich endeavours were made to get the matter arranged. vendor said at the trial that when he first read the sitions he had a good mind to cancel the contracts. was the time for him to act—his right arose at that In re Starr-Bowkett Building Society, 42 Ch. D. 375. efendant relied upon Woollatt v. Peggie, 15 App. Cas. nd upon first reading it seems to support his conten-but I think the decision turned upon the fact that the nasers had by delay and the course taken by them put t of their power to say that the vendor had waived his to rescind.

was argued that, as the contract was to be completed th October, plaintiffs were too late. I do not think so. was of the essence of the "offer" only, and the letter th October shewed that time was not regarded by the or as material.

efendant pleaded the Statute of Frauds, alleging that escription of the lands was insufficient, but I think the nce clearly shewed that there was nothing in that con-on. . . .

aintiff in each case is entitled to specific performance costs. If the parties cannot agree, there may be a ref-e to the Master as to the title, in which event the costs h reference will be reserved.

MARCH 21ST, 1907.

DIVISIONAL COURT.

RE MILES.

Construction—Residuary Bequest—"Parties Mentioned this my Will"—Application to Beneficiaries only—Per-s Named by Way of Description of Beneficiaries—Exe-ors—Persons Named in Codicils.

peal by the official guardian, representing certain s claiming as beneficiaries under the will of Robert

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B. Miles, from judgment of FALCONBRIDGE, C.J. 817, upon an originating motion under Con. Rul far as it declared that persons whose names were in the will, but were not beneficiaries there entitled to share in the residue.

M. C. Cameron, for the appellant.

M. F. Muir, Brantford, for E. A. Miles and D

J. H. Spence, for Ruth Stewart.

V. A. Sinclair, Tilsonburg, for the executors

W. S. Brewster, K.C., for Joseph W. Porter.

J. M. Godfrey, for Wellington Walker.

G. F. Mahon, Woodstock, for the Woodstock

The judgment of the Court (MEREDITH, C.J J., MABEE, J.), was delivered by

MEREDITH, C. J.:—The will of the testator less than 55 paragraphs, and by it devises and made to various persons and bodies. The only to which special reference need be made are which the testator gave to his nephew, Willia Miles, what is described as "my share of the e brother Joseph Miles, deceased, coming to m decease of Mary Jane Miles (now Mary Jane Phi ly wife of the said Joseph Miles, deceased;" p by which a legacy is given to the testator's Alberta Porter, described as "daughter of Will ick Miles;" paragraph 9, which directs payment visee mentioned in it of a sum of money to Nella described as "wife of Joseph W. Porter;" pa which directs a division of the proceeds of the sa lot between Carle Miles, described as "son of R Miles, deceased," and Albert Edward Carle, "son of John Carle, deceased;" paragraph 11, legacy is given to a nephew, Robert Miles, descri of George Miles, deceased;" paragraph 21, by wh is given to Robert Henry Miles, described as " Miles;" paragraph 22, by which a legacy is give Miles, described as "daughter of Elliott Miles; 39, by which a legacy is given to Edward Harol scribed as "son of William Little;" paragraph 4

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gacy is given to John Empey Little, described as "son Villiam Little;" paragraph 45, which is as follows: "I ct that my horse and harness and two buggies and cut- e sold to pay for a monument in case one shall be neces- ; in case no monument shall be necessary or my execu- deem it unnecessary, the last above mentioned articles l be sold by public auction and the proceeds of such shall be distributed among the poor of Tilsonburg;" graph 48, by which a legacy is given to the Ontario in- ite for the education and instruction of the deaf and ıb; paragraph 49, by which a legacy is given to the ario institution for the education and instruction of the d; paragraph 50, by which a legacy is given to the hos- l at Woodstock for the purpose of endowing a cot to be to poor or needy people; paragraph 51, by which a leg- is given to the house of refuge or poor house at Wood- k; paragraph 52, which is as follows: "I direct that all rest and residue of my estate, both real and personal, l be converted into cash by my executors and trustees inafter named, and shall after the payment of the ex- es of winding up my estate be divided share and share e among the different parties mentioned in this my will shall be living at the time of the winding-up of estate;" and paragraph 55, by which the testator ap- ted William Vivian, William Frederick Miles, and Wash- on A. Elliott, executors and trustees of his will.

The solution of the questions which have arisen depends what is the true construction of paragraph 52 of the which I have quoted.

t is necessary to a proper statement of the facts to refer to the codicils to the will—two in number, dated re- tively 30th April, 1904, and 18th May, 1904. By the of them the testator, giving as his reason for so doing leath of Carle Miles, one of the beneficiaries mentioned ıragraph 10 of the will, bequeathed the amount he had to the deceased beneficiary to the Baptist church at ord; by it he also revoked the bequest to the Ontario tute for the education of the deaf and dumb, mentioned ragraph 48, and that to the Woodstock hospital, men- d in paragraph 50 of the will, and directed that what een given to these institutions should form part of the ue of his estate, and he also revoked the appointment ederick William Miles as executor.

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The only provision of the second codicil w
mentioned is the direction to the executors to
Josephine Walker, described as "wife of Wel
ker."

The Chief Justice did not feel at liberty to
what he said was the plain every-day meaning
"mentioned" used by the testator in paragr
came to the conclusion that, according to the t
tation of the language of that paragraph, su
provision as to his being living at the time of
up of the estate, every person whose name is
the will or in either codicil is entitled to a shar
due.

I am, with great respect, unable to agree w
clusion.

It is, as it seems to me, highly improbable
tator intended to include in the class which
under the provisions of paragraph 52, persons
he had mentioned only for the purpose of ide
object of his gifts, and the fact that no less th
sons (paragraphs 4, 5, 10, and 11) who were
described as deceased are "mentioned" in th
sense which is given by the Chief Justice to the
tioned" makes it reasonably clear that the tes
intend to include among those who were to shar
due persons whose names were mentioned
purpose of the identification of his beneficiar
in my view, the effect of the construction a
treat the word "mentioned" as the equivalen
names are mentioned," which I venture to thin
different meaning. If such a meaning as that g
the Chief Justice is to be attributed to the
tioned," the result would follow that had the t
red to land devised by him as having been pu
A.B., or as being bounded on one side by the l
A.B. would have been included in the class t
residue is given, or had the testator declared h
not giving a like legacy to that given to his o
to his son John, that John had been an undutif
would nevertheless have taken an interest in
or had the testator referred to his horse or ca
one purchased from A.B., that A.B. must be in
class to which the residue is given. In popu

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n one speaks of mentioning a person in a will, the idea
eyed is the mentioning of the person by making some
ision for him in the will; and if that be a meaning of
h the words used by the testator are susceptible, I
v of no rule of construction which forbids the Court
ng that meaning to them, even though in their strict
nary grammatical sense they would bear a different
ning.

It is to be observed, too, that the words are "parties
tioned," not "persons mentioned," and why may not
word "parties" be read as meaning parties to the will?
t is, no doubt, an incorrect way of speaking of the bene-
ries named in the will, but it does, I think, no violence
he language by interpreting the word as meaning parties
he will, in the sense of being beneficiaries under its
isions.

Upon the whole, I am of opinion that paragraph 52 does
entitle any person whose name is mentioned in the will
as a means of identifying a beneficiary, to share in
residue, and that Joseph W. Porter, Wellington Walker,
Mary Jane Miles or Philip, are not, and that none of
n is, included in the class to which the residuary estate
ven.

There is a further reason why Wellington Walker is not
uded. He is not named in the will, but only in the
nd codicil.

The persons to share in the residue are "the different
ies mentioned in this my will . . ." It was argued
Mr. Godfrey that the term "this my will" was com-
ensive enough to include the codicils, and that the will
codicils together constituted the will of the testator.
. .

Reference to Sherer v. Bishop, 4 Bro. C. C. 55; Hen-
l v. Overend, 1 Mer. 26; Bonner v. Bonner, 13 Ves.
Hall v. Severne, 9 Sim. 515; Early v. Benbow, 2 Coll.
Gilooly v. Plunkett, 9 L. R. Ir. 324, 338.]

n my opinion, the executors and trustees are not "par-
nentioned in this my will," within the meaning of para-
n 52, and an additional reason for holding that they
ot is found, I think, in the fact that it is the executors
rustees who are to divide the residue among the parties
ested. Had it been intended that they should share

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in the proceeds, different language would hav
I think, from that which is used, which seem
that those who were to receive were different
those who were to make the division.

As there is no appeal by the Woodstock hos
of the other institutions to which legacies were
will, it is unnecessary to express any opinion a
they are included in the class to which the r
queathed.

The judgment of the Chief Justice should,
ion, be varied by substituting for the 1st par
the following: "1. This Court doth order and
Joseph W. Porter, Wellington Walker, and
Philip are not, and that none of them is, enti
in the residuary estate of the testator Rober
and by striking out the 7th paragraph of the

The costs of the appeal should be paid out
in the same way as the costs of the motion
to be paid.

MARCH

DIVISIONAL COURT.

BOAKE v. COUPLAND.

*Sale of Goods — Rescission of Contract — Retur
Action for Repayment of Price—Warrant
Pleading—Amendment—New Trial.*

Appeal by plaintiff from judgment of Mo
Judge of the County Court of York, dismissin
on the ground that plaintiff had failed to prov
able agreement for rescission of his contract
of a horse from defendant, and that upon the
was no issue raised or relief claimed upon br
ranty.

Plaintiff in his statement of claim alleged
from the defendant of a horse warranted sou
which was paid on 24th March, 1906; that on
May the horse was found unsound; that next d

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rned by arrangement with defendant; and that de-
agreed to repay to plaintiff at once the price of the
hich he had since neglected and refused to do; and
claimed $200 and interest.

is plea defendant admitted the sale to and pay-
plaintiff and denied the absolute warranty of sound-
up by plaintiff and all other allegations of plaintiff.

Ferguson, for plaintiff.

llies, for defendant.

judgment of the Court (MULOCK, C.J., ANGLIN, J.,
J.), was delivered by

IN, J.:—The evidence of both plaintiff and defend-
blished, and the learned Judge finds, that, while
e was en route to be returned to defendant, plain-
defendant by chance, and informed him that he had
horse back because something was wrong with his
hereupon defendant replied, "If you are dissatis-
the horse I will take him back and will give you
ney." The understanding of both plaintiff and de-
was that the horse should be returned in the same
n.

nce was given on behalf of defendant that very
after the plaintiff had returned the horse it was
be lame. This fact is not alleged in the statement
ce. Notwithstanding the plaintiff's denial that
e became lame while under his control, the trial
ppears to assume this fact against him, and upon
nd and also because, in his opinion, the agreement
ission was without consideration, he holds that
cannot succeed upon it. He declined to allow
to proceed in the alternative for relief upon breach
nty.

not understand the Judge's view that the agreement
ssion was without consideration. The return of
e and the implied undertaking of plaintiff to fore-
ght of action he might have for damages for breach
nty constitute, in my opinion, abundant consider-
support defendant's promise to repay the purchase

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Then as to the alleged lameness of the ho
that defendant should be allowed to set tha
standing his failure to plead it—it was for the
mine whether the lameness existed in fact
whether it was caused by anything which ha
horse while in the control of plaintiff. That t
properly questions to leave to the jury, if th
rescission were otherwise enforceable, the Jud
part of his remarks, concedes.

Then as to plaintiff's alternative claim fo
breach of warranty, upon a very strict reading
ment of claim plaintiff does not in terms ask f
But he sets up the warranty and its breach, a
joins issue upon the former allegation though
latter.

In one place the Judge says that plain
shewn the warranty;" in another, that "if the
a warranty there would have been something t
there would have been a conflict of evidence."

Plaintiff certainly swore to an unqualifie
soundness, and was corroborated by his son a
Boggs.

In these circumstances, it would have been
indulgence to have allowed plaintiff, if necess
his pleading by formally claiming in the altern
for breach of warranty. Such an amendment w
no injury on account of surprise or otherwise
But counsel for plaintiff does not seem to ha
the Judge, rather insisting, as indeed he di
his pleadings as drawn entitled him as of righ
if warranty and breach thereof should be
jury. In this view I do not agree.

Being of opinion that the pleadings sho
amended to allow of the alternative claim for
that the withdrawal of the action from the ju
missal by the Judge upon the other branch of
erroneous, I would direct that the judgmen
and a new trial had. Costs of the former tr
appeal should be costs to plaintiff in the cau

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EE, J. MARCH 22ND, 1907.

WEEKLY COURT.

E RICKEY AND TOWNSHIP OF MARLBOROUGH.

nicipal Corporations—Local Option By-law—Publication f By-law in Newspaper—Compliance with Statute—Dates f Publication—Posting Copies of By-law in Public Places —Admission of Illegal Votes—Irregularities—Result not ffected—Motion to Quash—Dismissal—Costs.

Iotion by one Rickey to quash a local option by-law car- by the electors of the township of Marlborough on 7th ary last upon a vote of 213 for and 132 against, and ed by the council.

. B. Proctor, Ottawa, for applicant.

. S. Henderson, Ottawa, for the township corporation.

IABEE, J.:—The by-law was supported by a majority of ove the necessary three-fifths.

Perhaps the most serious attack is that contained in the ground, that the by-law was not advertised as required ec. 338 of 3 Edw. VII. ch. 19, which requires (sub-sec. hat the day "fixed for taking the votes shall not be less 3 nor more than 5 weeks after the first publication of proposed by-law;" and (sub-sec. 2) "the publication . . . be continued in at least one number of such r each week for 3 successive weeks;" and (sub-sec. 3) ended to each copy so published . . . shall be a e signed by the clerk . . . stating the date of first cation . . ."

he by-law was first published on 27th November, but h December the council by resolution declared this egularity, and resolved to publish it on Tuesday 11th nber, and once a week for 2 successive weeks there- The paper selected was "The Twice a Week Citizen," hed on Tuesdays and Fridays. The first publication ot made in the issue of Tuesday 11th December, but issue of Friday 14th December, and thereafter in the

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issues of Tuesday the 18th and 25th Decer
notice signed by the clerk pursuant to sub
11th December as the date of the first pub
contended that the week of first publication be
the 14th, and not Monday the 10th; that
ended on the 21st, the second on the 28th,
on 4th January, 1907; so that there we
tions during the first week and none during
I do not think the error in advertising on 2
and its abandonment affect the matter: Re
Village of Grimsby, 12 O. L. R. 211, 7 O. W
W. R. 81. Nor do I think the wrong date o
tion given in the certificate of the clerk is fat

[Hall v. South Norfolk, 8 Man. L. R. 430
and explained.]

Regarding the 14th December as the date
cation, the day fixed for taking the votes
than 3 nor more than 5 weeks after suc
. . . The provision is not that it shall be
3 weeks, but that it shall appear in one nu
paper each week for 3 weeks; it did appear in
the week in which the 14th fell, for the week
18th fell, for the week in which the 25th f
different dates were in three successive we
this was a compliance with the Act. Had
different conclusion, Re Robinson and Village
8 O. W. R. 689, 9 O. W. R. 273, where it seems
held that a strict compliance with the Act as
is not a condition precedent, and is only to
where the result may have been affected, w
have stood in the applicant's way.

The applicant alleges that copies of the by
put up at 4 or more of the most public places
ship: sub-sec. 2 of sec. 338. Upon the argum
this matter was left in an unsatisfactory state
sion was given to file additional material, and
clerk has filed a supplemental affidavit, and h
examined upon it, and the point is still left i
doubtful position. In the clerk's affidavit, sw
argument, he says he personally posted n
Molakoff P. O., Pierce's Corners, and at the
Marlborough: that these are 3 of the most pu

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ship; and that he handed the fourth copy to George
a member of the council, to be posted up. When
oss-examined he states that he did not personally
he copy at Molakoff P. O., nor was he present when
done, but that, as far as he knows, his daughter
e did not hand a copy to Powell, and is not able to
her he mailed it to him, or if so when. Mr. Powell
his affidavit that on 14th December he received
clerk the copy with the request that he post it up
f the most public places in his section, and that he
describing the place of posting. No notice was
t Burritt's Rapids, a village situate partly in the
, and I should have thought that one of the places
h a notice should have been published, but it is
le upon the material here to sit in review of the
ns arrived at by the clerk and one of the coun-
s to what were the most public places. Attempt
seems to have been made to comply with the dir-
of the statute upon this point, and I am unable
was not complied with.

next serious ground is the admission of illegal votes.
erial shews that William Ormerod had no right to
is doubtful if Brinton, Poole, Smith, and Bennett
s; but, even assuming that these 5 votes were ille-
should be deducted from the 213 supporters of
aw, still it was carried. It was contended that 10
llots should be counted in estimating the number
pon the by-law to ascertain if it had the three-fifths
. I do not think so, and have no reason to change
I expressed in Re Cleary and Township of Nepean,
R. 406, upon this point. One ballot was excluded,
marked against the by-law, because the deputy
otten to initial it. I think this should count in the
ing upon the by-law, and that 343 votes were polled
of 342, but this makes no difference in the result.

r irregularities, and very many of them, appear in
eedings. The council omitted to appoint poll clerks,
are now required to do under the amendments to
of 3 Edw. VII. ch. 19, by 5 Edw. VII. ch. 22, sec.
Edw. VII. ch. 34, sec. 5; no scrutineer against the
was appointed in No. 1; some of the deputies ap-
did not act, and one acted without being properly

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appointed. The township clerk, who was retu
acted as one of the deputies, which was highly i
Re Pickett and Township of Wainfleet, 28 O. R
persons were improperly allowed in the polling
in the ballot compartments; and other omissio
to refer to. Personally, I think the Courts sh
more strict compliance with the statutory
when by-laws of this character are submitted
vote. If the legislature lays down a mode of p
tended to be followed, I am of opinion that, not
the saving clause in the statute, a far too lax
grown up, and the cases have gone much too fa
ing by-laws where little, if any, attention has b
the local officers to the statutory preliminaries.
this has only promoted and encouraged non-obe
the plain provisions that the legislature intend
observed. I for one shall be glad when th
commences to swing back, and this disregard o
alities by municipal clerks and councils will c
the approval of the Court.

In dismissing this motion, I refuse the respo
as the attack was invited by the course taken
cil and clerk.

FALCONBRIDGE, C.J. MARCH

WEEKLY COURT.

RE YOUNG.

*Will—Construction—Legacy to Charitable Institut
tainty as to Object — Division among Inst
Similar Names — Residuary Bequest — Fa
definiteness—Trustees—Compensation.*

Motion by executors under Rule 938 for ord
construction of will of Robert Young, late of
of Elma, in the county of Perth. One questi
the disposition of a legacy to the Home or In
the Aged and Infirm, Toronto, of $400, there

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in Toronto of that name, though there were sev-
ilarly named. The will also contained a provision
after certain legacies, expenses, and bequests were
heirs could be found for the remainder of the estate,
utors were to divide and give it to any needful and
institution or institutions, or any needy and worthy
al or individuals, as they should think best, and the
s, being in doubt whether they had the right to
their discretion in the selection of beneficiaries of
s or classes mentioned, asked the opinion of the
s to this, and also as to whether they were entitled
sual allowance to trustees for their care, pains, and
in investing, realizing, and paying over the moneys
state, beyond the sum of $100 bequeathed to them
estator.

. Spence, for executors.

. Small, for Church Home for Aged.

. Ferguson, for House of Providence.

. Cassels, for Old Folks' Home.

ley Denison, for Toronto House of Industry.

. Cameron, for the Infants' Home.

CONBRIDGE, C.J.:—Following Re Graham (Meredith,
th July, 1904), I direct that the sum of $400 be-
d to the Home or Institution for the Aged and In-
oronto, be divided among the 5 charities represented
the Court, viz., the 4 mentioned above and also the
Industrial Refuge and Aged Men's and Women's

o the residue, there is no general trust for charity
the whole fund, and no general charitable intent
ed; the terms of the will are indefinite, and there is
ite object of the trust, and the case is covered by
v. Attorney-General, [1899] A. C. 309; Jarman, 5th
170, 173 et seq., 209, 210. In re Huyck, 10 O. L. R.
. W. R. 794, 6 O. W. R. 112, is quite distinguishable;

executors as trustees cannot take absolutely, and the
must devolve on the next of kin as undisposed of.

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Declaration that the trustees are entitled to compensation over and above the sum of $100 to them.

Costs to all parties out of estate.

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THE

NTARIO WEEKLY REPORTER

(To and Including March 30th, 1907).

IX. TORONTO, APRIL 4, 1907. No. 12

TWRIGHT, MASTER. MARCH 25TH, 1907.

CHAMBERS.

ADIAN OIL AND WASTE SAVING MACHINE CO. v. TORONTO SUBURBAN R. W. CO.

e—Motion to Change—County Court Action—Preponderance of Convenience—Witnesses.

Iotion by defendants to transfer action from County t of Leeds and Grenville to County Court of York, so the action might be tried at Toronto.

. B. Henderson, for defendants.

. L. Hoyles, for plaintiffs.

HE MASTER:—Plaintiffs allege that defendants bought y last a machine on 30 days' trial, which was accepted as not been paid for. The statement of defence denies sale and delivery, and further sets up the 17th section Statute of Frauds.

efendants' manager deposes that the negotiations on plaintiffs must rely took place between himself and iffs' agent, who lives in Toronto, and that no other evi- on this point is possible.

e then says that defendants cannot safely proceed to vithout at least 8 witnesses, all living at or near To- But it is not said what they are to be called to prove, there any issue raised in the statement of defence of chine having failed to give satisfaction or the like.

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Plaintiffs' manager does not contradict th defendants' affidavit, but asserts what the st fence itself says, that the chief ground of defe tute of Frauds. He then says that defendan no more witnesses than the plaintiffs, whose at Brockville, but does not say what this will the Statute of Frauds is the substantial defe can be no ground for transferring the action. quires a stronger and clearer case than whe asked to have the place of trial changed in action.

If defendants' manager and plaintiffs' age here, and are the only necessary witnesses, manager at least would require to be present, a then be no preponderance of convenience. If is open to defendants on the pleadings, then t to shew what their 8 witnesses are going to way of deciding if plaintiffs will not require s how many, witnesses on their behalf.

The whole material is meagre and unsatisfa indicated. It does not appear whether the ma sent back or where it is now. For all that i pleadings, defendants may still have it, or it returned to plaintiffs, or be lying in some f sold for unclaimed goods.

If, however, the real issue is that on the Stat the silence on other points is easily understood

Assuming this to be the case, the motion missed with costs in the cause to plaintiffs.

CARTWRIGHT, MASTER. MARC

CHAMBERS.

WADE v. ELLIOTT.

Venue—Motion to Change—Preponderance of Witnesses—Expense—Terms.

Motion by defendant Elliott to change venue to Cobourg.

J. H. Spence, for applicant.

A. C. McMaster, for plaintiff.

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IE MASTER:—The statement of claim alleges that de-
nts reside in the county of Northumberland, and that
ansactions complained of also took place there. Plain-
s assignee for benefit of the creditors of defendant
water, is seeking to set aside a chattel and a land mort-
given by Drinkwater to his co-defendant as being fraudu-
and void against the other creditors. The defendant
t swears that he will require "at least 12 witnesses,"
sident at or near Cobourg. These include the local
rar of the High Court of Justice, the registrar of deeds,
cal manager of the Dominion Bank, and the assessor of
wnship of Haldimand. The others are said to be farm-
that township, who are very busy at this time of year.
dant Elliott offers to admit the execution by his co-
dant of the assignment for the benefit of creditors on
ovember, 1906.

his affidavit is supplemented by one of the solicitor, who
that it will be necessary to have the originals of the
ment and of the chattel mortgage produced at the trial,
lso the assessor of the township of Haldimand to prove
lue of the farm in question. He states that 7 other
sses will be necessary, all living in the township of Hal-
d, and he gives their names. He also speaks of 2 or 3
as well as himself, being perhaps necessary also.

aintiff's affidavit states that he has no documentary evi-
to prove that the creditors were pressing defendant
water for payment, and that he will be obliged to call
creditors to at least the number of 5 and perhaps more
rther investigation, and that they are all resident in
to. He offers to allow certified copies of the docu-
of record and of the entries in the bank books to be
as evidence. He also says that the books of the other
ors will have to be used to prove his case at the trial.
tiff, his employee who assisted in taking the stock of
solvent and had several interviews with him, and 5 other
sses at least, will, therefore, be material in the view of
iff and his solicitor.

efendant Elliott's solicitor has replied to this, insisting
t will be necessary to have the original documents on
oduced, as well as the original bank books at Cobourg,
he local manager to explain the same and other matters
ue in the action.

is impossible to know beforehand how far these state-
will be verified at the trial. Of necessity many of

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them are made at the time in perfectly good fa
it turns out that both sides have been unduly
and have given the utmost limit of what they
Under these circumstances, it is the safer cou
that each party knows his own case, and not a
cide how things may turn out at the trial.

In the present case the defendant deposes t
(and his solicitor suggests the possibility of 2
Plaintiff deposes to at least 6 witnesses, and als
possibility of more after he has made further i
insolvent's creditors. Assuming that defendan
more witnescses than plaintiff, the expense wil
than $40, allowing for two days and conduct n

This does not seem enough to establish the
ponderance. If the case was sent down to Cob
tings, it might not be tried at once, as it would
until the jury was dismissed if any jury case
If, for any reason, the case was not heard, the
be a motion to bring it back, as Cobourg non-ju
on 3rd June.

The motion, therefore, fails, but the extra
trial at Toronto (if any such should be shew
defendant in any event.

The personal attendance of the officials will
sary, nor is it at all usual. Apart from this, th
of witnesses cannot be considered.

CLUTE, J. MARCH

TRIAL.

MONTGOMERY v. RYAN.

RYAN v. BANK OF MONTREAL AND MO

*Banks and Banking—Overdrawn Customer's A
missory Note—Collateral Securities—Tran
Party—Breach of Bank Act by Allowing I
Sale of Customer's Account—Rate of Int
ment—Compounded Interest at 7 per Cent.
Dismissal of Action by Transferee of Note
—Damages in Cross-action.*

The first-mentioned action was brought by J
gomery against Peter Ryan to recover $12,789.2

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5 per cent. from 16th July, 1906, upon a promissory note, ed 16th November, 1905, payable on demand, for $17,240 h interest at 6 per cent. until paid, made by Peter Ryan he Bank of Montreal, and transferred to Montgomery by bank with certain collaterals pledged by Ryan to secure account with the bank.

Ryan by his defence to this action denied indebtedness alleged that the note had been paid by collections made the bank, in respect of which credit had been given in part y; that the bank held as collateral a claim against the icroft Water Electric and Improvement Co., upon which bank received judgment for $3,325.60 and costs of ac-n, which had been paid, amounting in all to $3,775.31; t the bank made other collections from collaterals, and ngly debited Ryan with certain alleged costs, and illegally rged interest, discount, and compound interest against n; and he counterclaimed for $12,500.

The second action was brought by Ryan against the bank Montgomery in respect of the same transactions. By statement of claim Ryan alleged that for many years he a customer of the bank; that in July or August, 1906, bank claimed a balance of $12,789.24 as due upon the missory note sued upon in the first action; that the bank ing made overcharges and neglected to give credits to n (as alleged by him in the first action) colluded and spired with Montgomery against Ryan to maintain this gal and wrongful condition of the account, and prevented n from obtaining a just and proper account, so as to ok the bank to wrongfully recover the $12,789.24; that tgomery was actuated by malicious motives, of which the were well aware, and the bank, in order to promote their wrongful purposes and objects and the wrongful and icious purpose of Montgomery, assigned and transferred rs account as a customer of the bank and the amount of indebtedness then alleged to be due, and received therefor 000, for the purpose of enabling Montgomery to attempt ecover from Ryan the said $12,789.24 as a pretended nce due on the account and upon the note, and as a part ich transaction assigned and transferred all the securities teral to the account; that the bank wrongfully and ille- exposed to Montgomery the account and dealings and sactions by Ryan as a customer of the bank, in order to t their wrongful purposes and to promote the combina- and collusion between the bank and Montgomery; that

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the bank entered into a covenant of indemnit
gomery at the time of such transfer; that Mont
proceedings to be taken against Ryan for the r
alleged balance, Montgomery being throughout
the bank; that the bank charged an excessive ra
that the bank and Montgomery intended to atte
upon the securities, and threatened the sale
thereof; that Ryan had demanded a full and t
in detail of his account with the bank, which
fused; and that the bank were negligent in n
tions upon the securities.

Ryan's claim was for an account; a declar
charges of interest and compound interest were
set aside and cancel the transfer of the accou
ties; for a statement of all securities held for
strain the bank and Montgomery from furthe
or dealing with the securities; for a declarat
wrongful, illegal, and collusive acts by and betw
and Montgomery and others as against Ryan;
000 damages.

The bank denied all charges of fraud or o
conduct, and alleged that on 15th November, 1
dered a statement to Ryan shewing the balance
account at that time of $17,240, which he a
correct, and therefore gave the note referred
bank held collateral securities for Ryan, whi
with under his direct instructions; that among
ties were certain promissory notes of the Ashc
which the bank brought an action, at Ryan's re
ish Columbia; that that action was defended,
came on for trial one John Shields, chairma
croft Co., offered to consent to judgment in
bank, and to take an assignment of the claim
against Ryan, and all the securities, including
held as collateral thereto; that the bank accep
and on 16th July, 1906, an agreement was mad
bank and Montgomery, as the nominee of Sh
the bank, in consideration of $12,789.24, transfe
gomery the Ryan account, amounting then t
and assigned and transferred to Montgomery
securities; that the bank received the sum me
the full consideration mentioned in the ass
transferred and handed over to Montgomery th
the collateral securities held by the bank; that

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rge illegal rates of interest, and did not refuse an ; that if an account should be ordered, it should be to 6 years; that at the time of the assignment Ryan tly and truly indebted to the bank in $12,789.24 in of the note, and payment thereof had been demanded used.

tgomery denied all charges of improper conduct, and that he was acting as agent of the bank. He claimed he assignment of 16th July and upon the note in- o him, of which he claimed to be the purchaser with- ice, and claimed the balance upon the note, less collected. He alleged further that among the se- given by Ryan was a certain mortgage of the Metro- Soap Co. for $10,000, dated 28th January, 1904; an had never executed an assignment thereof for tion, and had refused to do so; that among the securi- e also certain debentures of the Cape Breton Ex- n Co. for $2,500 each, registered in the name of nd that he had not transferred these securities so as e Montgomery or the bank to be registered as owner and had refused to do; and by way of counterclaim mery asked damages for such refusal and an injunc- training Ryan from incumbering or dealing with curities, and a mandatory order for assignment there-

eply, Ryan, besides joining issue, alleged that the pro- note was not intended to represent the actual in- ess, and that the attempted acts of the bank shewed eir acts were wholly unauthorized, irregular, and l and fraudulent as against Ryan, and that they had with Shields and Montgomery to ruin Ryan, and ir wrongful acts estopped them from alleging any in- ess to either of them by Ryan.

illar, for Montgomery.

I. Watson, K.C., and N. Sinclair, for Ryan.

. Shepley, K.C., for the Bank of Montreal.

RE, J.:—The evidence in part was very contradictory, n the correspondence and documents the main facts ciently clear.

n had an account with the bank since 1895; the ac- ews large transactions, the monthly deposits varying 0,000 to over $100,000. Hypothecation was made of

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various securities to the bank as collateral to future advances. At the end of each month through his duly appointed attorney, the m and acknowledged the correctness of the acco way. I find that the account was not exa himself or his attorney, and that he was not to time what rate of interest was being charg

On 16th July, 1905, Ryan gave a dem bank for $17,240 with interest until paid at 6 amount represented the balance due the ba advances, as appeared in Ryan's account, a terest at 7 per cent. and compounded month

Among the securities held as collateral the Ashcroft note, upon which I find Ryan h full face value in cash. The bank, pressing Ryan's request put this note in suit in B The action was defended, and one John S been interested with Ryan in mills and timbe ish Columbia, was exceedingly anxious to p being recovered upon this note against the dispute had arisen between Ryan and Shield certain sale made of timber limits and mills umbia. The uncontradicted evidence shews advanced some $197,000 to the Ashcroft Co., Shields were interested as stockholders. A s the entire interest of the Ashcroft Co. for Fowler and his associates, of which sum $17 paid to the vendors and the balance of $50,00 Fowler and his associates who had conducted for the sale. So that the actual purchase $175,000. The $145,000 that Ryan received payment of debts, leaving unpaid a lar Ryan, and the Ashcroft notes in the hands paid. A dispute had arisen in regard to ano between Shields and Ryan, in which Shields was entitled to receive some $20,000 from alleged that Shields was largely indebted to h of this dispute were not further disclosed.

When the transaction for the sale of th perty came to be completed, Shields controll and refused to convey to Fowler and his as had been paid the $20,000. If judgment ha and execution placed in the sheriff's hands croft notes, the amount thereof might have

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bank. Shields and Fowler, therefore, were interested m different motives in preventing judgment being obtained the Ashcroft notes: Shields because he had not been paid $20,000; and Fowler because he was interested in preting an execution against property for which he had in ole or in part paid. Under these conditions negotiations nmenced between Shields and the bank to purchase the an securities. At first it was desired to purchase only judgment to be obtained against the Ashcroft Co.; but the k refused to sell part, and insisted upon Shields taking r the entire account and the securities collateral thereto. is ended in an agreement with Shields, for whom Montnery was acting at this stage—Montgomery being the ninee of Shields. The agreement in the form of a letter, ich was accepted, is as follows:—

"Toronto, January 18th, 1906.

. D. Montgomery, Esq.

"Dear Sir: Bank of Montreal v. Ashcroft.

"As I understand, the verbal arrangement made with you afternoon on behalf of the defendants herein, in respect the action which will come up for trial at the sittings of Court in Vancouver, B.C., on the 23rd instant, is as ows:—

"1. Judgment to be entered for the plaintiffs for full unt of their claim and costs of action, by consent.

"2. No execution or attachment to be issued until the extion of 30 days after the 23rd instant.

"3. I am to telegraph instructions in accordance here- to Mr. Stuart Henderson, the solicitor for the plaintiffs he record, and you are to telegraph to Mr. Murphy, the ndants' solicitor on the record, to consent to the judgment rdingly.

"4. Provided the bank are the holders of or control the judgment, they will assign it to Mr. John Shields or nominee on payment of the amount thereof at any time re the expiration of the 30 days, and such judgment shall be otherwise assigned in the meantime except to Peter or his nominee.

5. In the event of Mr. Shields paying off the whole of ank's claim against Mr. Peter Ryan at any time within 30 days, while the bank holds the same, the bank will n the claim to him or his nominee, and all collateral ities held by the bank therefor.

"Yours truly, Crombie, Worrell, & Gwynne."

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There was a delay in carrying out this arrang
apparently Shields was not able to pay the money.
ment was made on 18th January, 1906, and a few
after Fowler came to Toronto, had an interview w
and finally arranged an appointment with Shi
office of Mr. Worrell, solicitor for the bank, who
with the negotiations which resulted in the tra
meeting took place on 26th January, 1906. Wh
arrangement was made, it was understood that F
take the place of Shields, advance the money, an
the Ryan account with the collateral securities. F
evidence denied that he was acting in harmony w
and said that on 26th January he did not know
of the negotiations between Shields and the ba
was evidently in error with reference to this, and
fact that he had knowledge of what had been do
ence to the agreement between Shields and the
Montgomery was to be the alter ego of Shields in
action, and that when Shields was not able to
money, the parties arranged to carry out the
ment that had existed between Shields and the b
name of Montgomery acting as trustee and in t
Fowler. Although the pleadings declare that
was acting for Shields, as a matter of fact thi
to prevent Fowler's name appearing. Fowler did
as he says, to have Ryan know that he was ac
premises, but the evidence was perfectly clear,
Fowler and Montgomery and the documents, tha
ery merely acted as his trustee. . . .

The bank held a balance against Ryan overdue
collaterals, which I find were more than sufficien
the claim. Shields and Fowler from different mot
to obtain these collaterals, to use as a lever or
Ryan in a way to compel him to pay the $20,000 wh
claimed, and in order to secure the title to the pro
Fowler had bought. The bank at this time we
for payment, and some ill feeling seems to have
tween Ryan and the bank manager over the accou
events, it was said that Ryan refused to again vis
The bank refused to sell the securities piecem
find as a fact that they were offered payment o
against the Ashcroft Co. in full, and refused
upon receiving the full amount of the account a
ring the whole account and all the securities.

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as kept in ignorance of what was being done; that he a notice, unsigned, sent by the bank's solicitors, but find that the further notice was ever received. . . further that the demand note was past due at the the alleged transfer. I also find that the note is made harges which include interest at 7 per cent. and com- nterest, and I further find that the bank never stipu- th Ryan for the payment of 7 per cent. interest.

formal agreement dated 16th July, 1906, made in ce of the letter above referred to, recites that the cation of the Ryan securities to the bank was for t of his then present and future liabilities, subject to s thereof. It refers to the recovery of the judgment bank against the Ashcroft Co., and recites: "And it was agreed at the said date that proceedings in last mentioned action should be stayed on the assignee to the assignors the full amount of the assignors' gainst the said Ryan and taking an assignment of claim and of all securities held as collateral there- t further recites that the amount owing in respect aid claim at this date is $12,789.24, and that the as- hold as security therefor the securities set out in the thereto: "And whereas the said assignee has this l to the assignors the sum of $12,789.24; now there- s indenture witnesseth that in consideration of the and of the payment to the said assignors of the said $12,789.24 of lawful money of Canada (the receipt is hereby acknowledged), the said assignors do hereby transfer, and set over unto the said assignee, his s, administrators, and assigns, all the said sum of 24 now owing by the said Peter Ryan as aforesaid, with all moneys that may hereafter become due or n respect thereof and the full benefit of all powers enforcement of payment thereof."

ill be noticed that the demand note is not specially ed, nor is it referred to in this document. It then with a general assignment of the collateral securities intent that the said assignee shall take and assume tion of the said assignors in respect of the said in- ess and of the said collateral securities," subject to s and condition set out in the letters of hypothecation rights and equity of redemption of the said Peter

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The bank then covenants that the said sum
not paid, and that the bank has done nothing
said Peter Ryan has been released or discharg
and then proceeds as follows: "And that they (
will at all times hereafter at the request of, but
charges, costs, and expenses of the assignee,
exhibit the books of account and other evidenc
ness and entries, and furnish copies thereof, re
collateral security, for the purpose of establish
and for the purpose of the enforcement of the c
specting such assigned premises as may be r
quired." Then follows the covenant of indemni
of the assignee.

Under the original offer and acceptance it wi
there was a time limit. This was extended
and, the full transaction not being completed,
sisted upon payment of the judgment, and the
gomery gave his cheque to the solicitor of the
amount of the Ashcroft judgment, and the soli
same until the transaction was finally carrie
Montgomery gave his cheque to the bank for t
including the amount of the judgment; where
July, the bank's solicitor, by cheque, repaid Mo
amount received from him, $3,773.31, being t
the Ashcroft judgment.

I find further that this judgment was neve
debtor, that is, the Ashcroft Company, but th
was paid by Montgomery, through moneys place
by Fowler, and that when the Ashcroft judgm
in the first instance by Montgomery it was u
tween him and the bank's solicitor that upon t
being fully carried out this amount should b
Montgomery.

On 16th July, 1906, Montgomery gave his c
Dominion Bank to the bank's solicitor, Mr.
$12,789.24. This cheque was indorsed over to
Montreal, and thereupon it was stamped pa
ments appear on the bank of the note shewing
ceipts upon the note, and also $12,200 appears i
the note. Afterwards, and, as the assistant ma
on the same day, the words "cancelled in err
dorsed on the note by the assistant manager
itself does not appear to have passed into the ha
gomery until about the time the action was bro

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lf one is to judge from what took place at the time, it ld appear that the bank regarded the note as paid, and neither party regarded it as material to the transaction entered into by the agreement of 16th July, 1906. The not being mentioned in that agreement, it would appear the parties did not consider a transfer material, and I inclined to think it was an afterthought on the part of ntgomery's solicitor to demand the note as the most convenway of recovering the balance of the account from Ryan. s view reconciles all the evidence. It was collateral securi- that Shields and Fowler desired, and the question of the nsferring of the note, I think, never was considered, and nd as a fact that when the negotiations were closed and the ney paid, Montgomery accepted and received the assign- nt of the account and the collateral securities, and did not for or receive the promissory note sued on; and I find at the time the bank assumed to transfer the note there nothing due to the bank upon the note, so far as the k was concerned, the bank having received their entire m by the assignment of the account and the collateral rities as above mentioned. I think, however, that under agreement, although the note was not mentioned and bably not thought of, its terms are broad enough to entitle ntgomery to call for its delivery. I refer to the clause he agreement which provides "that they (the assignors) upon request . . . do, perform, and execute every deed, and further assurance necessary to enable the said gnee, etc., to enforce the full performance of the obliga- s respecting the hereby assigned premises." In other ds, that Montgomery having purchased the account and terals, and this account being at the time covered by demand note, he had the right from his position to call the demand note as an act to be done by the assignors as rther acknowledgment and assurance of the account, and it is by virtue of the agreement that he was entitled to transfer, and not otherwise, and that, if the agreement ld fail, his right to a transfer of the note would neces- y fail with it.

find further as a fact that the bank furnished copies ne securities and submitted the account of Ryan to the ection of Montgomery and his solicitor, and that, with bank's knowledge, the money was attempted to be raised ransferring the entire account and the securities to the k of Hamilton, and I find that not only did they permit

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inspection of Ryan's account, but their co
further inspection was the foundation of the
out which the assignee, Montgomery, would p
carried out the purchase.

The points for decision on this branch o
this somewhat complicated statement of facts

1. Have the bank been guilty of a breac
the Bank Act?

2. If so, does such breach invalidate the w

3. Having regard to the manner in which
ceived, does it preclude Montgomery from
the note?

4. Is Ryan entitled to damages for the alle
him by breach of the Bank Act in permittin
be inspected and sold?

Section 46 of the Bank Act of 1890 is a
Inspection of books:—the books, correspond
of the bank shall, at all times, be subject t
of the directors, but no person who is not a
allowed to inspect the account of any pers
the bank."

In Re Chatham Banner Co., Bank of
2 O. L. R. 672, Street, J., suggests "that the
clause probably was to do away with the right
holder in the bank, as a quasi-partner, migh
asserted of inspecting the accounts of a ban
It was held in that case that the clause do
bank to refuse to disclose its transactions wit
tomers, when the propriety of those transactio
in a court of law between the bank and anothe
attacks them and shews good cause for requiri
tion he seeks. This clause was first made a p
Act of 1871 (34 Vict. ch. 5, sec. 37).

It seems probable that the clause was intro
rest the doubt as to the law as it stood prio
ment. In Tassul v. Cooper, 9 C. B. 509, Mau
doubt as to whether there was any such duty
bank, while in Foster v. Bank of London,
it was held that an action lay for this breach
Handy v. Veasey, L. R. 3 Ex. 107, Byles, J.,
that a bank might make such a disclosure
occasion.

In the present case inspection was allow
of selling the account, and on the sale of the a

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enanted to allow future inspection. The question, there-
, resolves itself into this: Had the bank a right to allow
pection with a view of selling, and having sold to allow
pection to the purchaser? And is an agreement for sale
taining such covenant valid so as to pass the account?
e right of inspection was insisted upon by the purchaser
l granted by the bank. If the bank had no right to allow
pection, is that part of the agreement valid, and the
use only invalid which allows inspection?

It is against the policy of the law that any person who is
a director should be allowed to inspect the account of
one dealing with the bank, and, this being so, any agree-
nt which carries with it the right to inspect is in direct
travention of the Bank Act. Indeed I do not well see
any account could be sold without inspection, and if that
so, a bank has no right to sell a customer's account as such.
e evidence shews that the present case is unprecedented so
as the Bank of Montreal is concerned.

It is difficult to imagine anything more likely to shake
lic confidence in our banks than the knowledge that cus-
ers' accounts are open to inspection and sale. Great in-
tice might be done by exposing the private affairs of a
tomer and selling his account to an avowed enemy or one
desired to use his information as a "lever" for private
s, as was admitted in this case. Having regard to the
standing of the Bank of Montreal, it is almost incredible
they should so disregard their duty to their customer.

As I have pointed out, the transfer of the account, col-
rals, and note was under this illegal contract. Mont-
ery had no other title except that which he received under
contract, made in direct violation of the law: Bensley
egnold, 5 B. & Ald. 340.

I think the whole agreement is void, because there is one
re consideration, viz., the sum paid for what Montgom-
was to receive. He bargained for an assignment and in-
tion of the account, and, assuming that he was entitled
aim a delivery of the note, it also was under the agree-
t.

ven supposing that the assignment of the account was
and the agreement to allow inspection illegal, one sum
id for both, and the whole contract is void: Hopkins v.
ott, 4 C. B. 578; Alexander v. Owen, 1 T. R. 227.

will deal now with the question of interest. . . .
erence to Dawes v. Pinner, 2 Camp. 486 note; Page v.

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Broom, 4 Cl. & Fin. 436; Mosse v. Solt, 32 l
carty v. Latouche, 1 B. & B. 428; Ex p. Be
Barnum v. Turnbull, 13 U. C. R. 277.]

In the present case to keep the account u
system would be to allow 7 per cent. com
would be more than the legal bank rate of

From the cases cited it would seem th
stipulate for compound interest, or such an
be implied from the course of dealing, but in
it be done so as to allow the bank to recover
beyond what the law allows. . . .

[Reference to sec. 80 of the Bank Act, p
higher rate than 7 per cent. shall be recover

I find that there was no stipulation or
interest. There was an entry in the disco
bank, under Ryan's name, shewing that he w
7 per cent., but it was not suggested that h
of such entry. There is a contradiction as to
when it came to his knowledge that he wa
7 per cent. Ryan says the manager promised
that is, reduce it to the legal rate. The as
who was present, says that only referred to the
If the higher rate of interest had been sti
properly charged, there was no consideratio
duction, and the promise was a mere nud
interest was illegally charged, there is no evi
agreed to pay this past overcharge.

The question, therefore, is reduced to
having in fact charged 7 per cent. compo
bound by the monthly receipts given for the
slips read as follows: "Toronto, 1 Feb.,
confirm the statement of my account with th
treal, Toronto, to 30 Jan., 1904, as contai
book, and acknowledge receipt of all chequ
to same date. Peter Ryan, per K. O.'Keefe

I do not think this confirmation amount
edgment that he will pay any rate of inter
charged. It may be prima facie evidence o
of the account, but it surely would not i
error, much less illegal charges, if there be su
of Montreal, 11 O. L. R. 595, 599, 7 O. W.

Here the bank seek to charge 7 per ce
monthly. I take the meaning of the statut
bank may stipulate for 7 per cent., and in

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t, express or implied, the legal rate of interest for the
pplies. I find that there was no contract with Ryan
h rate. . . .
eference to Royal Canadian Bank v. Shaw, 21 C. P.

der sec. 80 the bank have a right to receive and take
ance 7 per cent. That is a different thing from com-
ng monthly at 7 per cent. on the balance. I find
hority for that.
. Shepley argued that at all events Ryan had acquiesced
t was done, and cited Williamson v. Williamson, L. R.
542, but in that case the charges were explained to his
and no objection made.
Crosshill v. Bower, 32 Beav. 86, it was expressly agreed
he rate of interest should be 5 per cent. per annum,
e custom was to compound at the end of the year, and
as allowed. I do not think sec. 80 permits the bank
rge 7 per cent. compounded monthly. That would
t be charging more than 7 per cent. This is what the
have assumed to do, and not being within the limit
l by sec. 80, it is illegal, whether agreed to or not:
Canadian Bank v. Shaw, supra.
plying these findings to the respective actions. . . .
omery v. Ryan should be dismissed with costs, and the
claim in that action dismissed without costs.
Ryan v. Bank of Montreal it was agreed that I should
the damages for the wrongful inspection of Ryan's
t if so found.
hink Ryan suffered substantial damage. It was urged
Watson that Ryan was entitled to recover the full
f the securities, $26,000. . . .
got v. Cubley, 15 C. B. N. S. 701, distinguished.]
Watson's contention I do not think tenable, because
I am right in the view I take, there was no conversion,
g passed by the assignment, and (2) a claim for con-
of securities could not fall under this claim for dam-
. . .
eference to Mayne on Damages, 7th ed., p. 8; Rolin v.
d, 14 C. B. 595; Lorios v. Gurety, L. R. 5 C. P. 346;
n v. Bank of England, 18 Times L. R. 339.]
the present case there were special circumstances, al-
ndicated, why Ryan's account ought not to have been
ed, having regard to the business relations and enmity

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existing between the parties. What his pecuni
be is as yet uncertain. Even if Ryan justly owe
amount claimed by him, and the disclosure
Shields to obtain payment, that is no excuse o
the bank: see Foster v. Bank of London, 3 F.

After the best consideration I have been abl
branch of the case, I think $1,000 would be
sum, and I assess the damages at that amount.

Ryan to have judgment declaring wrongful
void the agreement for the transfer of the accou
and note in question. Reference to the Maste
account of the amount due the bank at the le
or 5 per cent.; no compound interest to be allow
have credit for all payments made on the securi
the bank, their solicitors, or Montgomery. R
credit for the full amount of the Ashcroft ju
and costs received by the bank, and an account
ties received by the bank from plaintiff and pa
thereon. Judgment for Ryan for $1,000 with c
up to and inclusive of judgment. Further d
costs reserved.

MARCH

DIVISIONAL COURT.

DIXON v. GARBUTT.

*Particulars — Counterclaim — Alternative Clai
Meruit.*

Appeal by plaintiff from order of FALCON
ante 509, dismissing appeal by plaintiff from or
in Chambers refusing to direct defendant to giv
of an alternative claim upon a quantum meru
defendant by way of counterclaim.

W. Laidlaw, K.C., for plaintiff.

W. E. Middleton, for defendant.

THE COURT (MULOCK, C.J., ANGLIN, J., CL
missed the appeal with costs; but ordered, on c
fendant, that the amount of defendant's clai
quantum meruit be inserted in the order, and, if
to by plaintiff, should be the subject of a refere

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REDITH, C.J. MARCH 26TH, 1907.

WEEKLY COURT.

RE PELLETT.

l — Construction — Devise—Heirs of Brother—Heirs of Wife—Will of Wife—Will of Brother—Trust—Conversion —Power of Appointment — Exercise by Will — Implied Gift—Distribution of Estate.

Originating motion under Con. Rule 938 for the deter-ination of questions arising upon the will of Friend Pellett, ed 5th September, 1887, and the will of Emily Jane Pel-, dated 13th September, 1899.

G. M. Vance, Shelburne, for the executors.

C. A. Moss, for Albert John Mason and Edna Lillian ines.

W. R. Cavell, for the devisees of James Pellett.

B. F. Justin, Brampton, for Ellen Sophia Hall.

M. C. Cameron, for heirs-at-law of Emily Jane Pellett.

MEREDITH, C.J.:—Friend Pellett was the owner of the three-quarters of the south half of lot 19 in the 2nd cession (old survey) of the township of Melancthon, which devised to his wife Emily Jane Pellett for her life, and y his will provided for the disposition of this land after death by the following provisions of his will:—

After her death I authorize and empower my execu- to sell my real estate, and, after paying all necessary and expenses, to pay over one-half of the proceeds of real e sale to my brother James Pellett, or his heirs, and other half of said proceeds to the heirs of my wife, as may irected in her will."

4th. If at any time during the lifetime of my wife, lf and either one of my executors should deem it best er interest and more likely to conduce to her comfort convenience to sell the real estate before mentioned, I y empower them to do so, in which case the proceeds of sale shall be divided as follows, viz., one-half shall be over to my wife and the other half shall be deposited in rtered bank or invested in first class securities as may

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be deemed best by my executors; the interest
shall be paid to my wife either yearly or half
may desire, but the principal sum shall rema
shall at her death become the property of my
Pellett, or his heirs."

By her will, Emily Jane Pellett devised t
Mason one-third of what is described as "m
real estate being composed of the east half of t
lot number 19 in the 2nd concession (old survey
ship of Melancthon . . .," to Ellen Sophia
of the same share described in the same way,
Lillian Haines one-third of the same share de
same way, in case and when she should attain
years, with a gift over, if she die before atta
of 21 years, to Albert John Mason and Ellen
in equal shares.

Emily Jane Pellett died on 21st March, 1
and without leaving any lineal descendants, b
surviving 6 sisters, and 5 children of a decease
Haines.

She also left surviving her 5 children—of wh
lian Haines is one—of William Haines, a son o
sister, Annie Haines.

James Pellett died on 26th October, 1904,
will, dated 20th December, 1900, devised one un
quarters of the interest in the lands devised
will of Friend Pellett, to Emily Pellett, no
eighth of that interest to Jane Chadwick, and
one-eighth to Sarah Copeland.

It does not appear upon the material befor
conditions upon which the power of sale ment
graph 4 of the will of Friend Pellett was to co
ever happened, though there appear to have bee
between Emily Jane Pellett and Albert Jam
the sale of the Melancthon property to him.

The first question to be determined is as to
the provisions of the will of Friend Pellett
quoted.

The effect is, in my opinion, that Emily Jan
an estate for life in the whole of the Melanct
that a trust was created for the sale of the pr
executors upon the determination of that es
the division of the proceeds of the sale as di
will; that this trust operated as a conversion

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rievson v. Kirsopp, 2 Keen 653; Barrett v. Baskerfield, 11 eav. 525; Nickisson v. Cockill, 3 DeG. J. & S. 622; Re ooke's Contract, 4 Ch. D. 454; that one-half of the proeds of the sale passed to those persons who at the death Emily Jane Pellett were her heirs at law, with power to r to direct by will what shares they should take; and that, default of appointment by her, and so far as any appointent should not extend, the heirs at law take the fund as pernalty under an implied gift to them, in the event of the ower not being exercised: Farwell on Powers, 2nd ed., p. 6 et seq., 472 et seq.

The will of Emily Jane Pellett operated as a valid ercise by her of the power of appointment as to the share the Melancthon property which she gave to Ellen Sophia all (one-third of the undivided half); but not as to the pointment in favour of Albert John Mason and Edna Lilin Haines, neither of whom was an object of the power.

The appointment in favour of Mason and Ellen Sophia all, in the event of Edna Lillian Haines dying under 21, in my opinion, inoperative. It was only that which Edna llian Haines was intended to take in the event of her taining 21 which was to go over, and, as the devise to her inoperative, the gift over, in my opinion, fell with it. it were otherwise, Ellen Sophia Hall only would have ken, as Mason was, as I have said, not an object of the ower.

So much of the fund over which Emily Jane Pellett had e power of appointment as was not validly appointed passed her heirs under the implied gift, in default of appointent: Farwell on Powers, 2nd ed., p. 312, and cases there ed.

The children of William Haines take nothing, as they are t heirs of Emily Jane Pellett, there being no representan of collaterals beyond brothers' and sisters' children.

The result is that there will be a declaration and judgment at upon the true construction of the wills of Friend Pelt and Emily Jane Pellett, in the events that have happened, Emily Pellett (daughter of James Pellett) is entitled three-eighths and Jane Chadwick and Sarah Copeland aughters of James Pellett) are each entitled to one-sixnth of the proceeds of the sale of the Melancthon property, d that of the remaining one-half of the proceeds of the e, Ellen Sophia Hall is entitled to one-third, and that remaining two-thirds is divisible between the 6 surviv-

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ing sisters of Emily Jane Pellett and the 5 surv
ren of Annie Haines, her deceased sister; each of t
sisters being entitled to one-seventh of the two
the surviving children of the deceased sister to th
one-seventh thereof equally between them.

The costs of all parties will be paid out of t
Friend Pellett, and the executors are to be enti
costs between solicitor and client.

MACMAHON, J. MARCH

TRIAL.

FOSTER v. TORONTO ELECTRIC LIGH

*Nuisance—Clanging of Heavy Gate—Jarring H
ing—Disturbance of Inmates—Damages—Ob
Highway—Erection of Fence—Disputed Bou
—Evidence—Possession—Counterclaim—Ho
over upon Adjoining Land—Injury to Fence
Projecting Eaves—Easement—Prescription.*

Action for damages and an injunction in res
pass and injury to plaintiff's house and land. C
for damages for injury to defendants' propert
plaintiff's.

F. J. Roche, for plaintiff.

J. S. Lundy, for defendants.

MACMAHON, J.:—In the statement of clai
owned and occupied by plaintiff is called No. 1
The lot on which the house is built was conveye
1850, by John Ritchie to Joseph Foster as be
park lot 10 in Toronto, and described as lot 27
40 feet front and 80 feet deep more or less on
of Elizabeth street. . . .

Joseph Foster, the father of plaintiff, buil
which is situated on the south side of Foster plac
east end thereof, 55 years ago. The front of
rough-cast, and faces the north; the east side was
and adjoins defendants' property, being lots 18 a
west side of Teraulay street, which extends to the

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st end of Foster place, across which defendants, more 10 years ago, put a large gate, thus making a cul de Foster place. This gate is 10 feet wide and 8 feet . . . weighing between 500 and 600 pounds, and a beam across the top, with pulleys, by means of the gate is opened and closed. This large gate was . . . up, there being, until 3 or 4 years ago, a small gate in rge one, used as an entrance and exit to and from the When defendants commenced to use the large gate, ut a scantling in the ground at the north-east corner intiff's house, to which the scantling was nailed by spikes. And I find that whenever the gate was opened thrown back with such violence that it shook the house used the plaster to break and fall from the walls, until 4 years ago, when plaintiff put anchors in the wall, prevented further breaking of the plaster. Defendants ed of the cinders at the works to contractors for grano- pavements, who as a rule removed the cinders at night, e frequent opening of the gate not only shook the house, sturbed those sleeping therein.

ere must be judgment for plaintiff for the damage by the jarring of the house and for the disturbance aintiff and his family, which I assess at $150. There so be judgment for plaintiff enjoining defendants from or causing to be nailed to plaintiff's house any post, or scantling to be used in connection with the shut- r opening of the gate . . . or otherwise.

e 5th paragraph of the defence alleges that Foster place d is a public highway, and that plaintiff wrongfully a fence on the public highway in front of his prem- as to obstruct and prevent the use of Foster place as a y.

e executors of C. A. Hagarman, on 6th January, 1849, ed to John Ritchie lots 20 to 29 inclusive, and lots 34 5 on the east side of Elizabeth street, being part of ot 10 according to a plan made by David Gibson for Hagarman. A plan was produced at the trial from the y office, marked "13a," but it is not signed by the of the land (who died on 18th May, 1847), nor by the or, nor is there any date thereon shewing when it was ted in the registry office; but, as plan 13 was registered h December, 1849, and plan 14 on 15th April. 1850, ficials in the registry office concluded that 13a was ted early in 1850.

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Foster place was originally Dale street, but
ber, 1888, the corporation of the city passe
changing the name from Dale street to Foste
name "Dale street" is not on the plan put
place" appears written in pencil where D
The description of lot 27 is 40 feet front an
The frontage according to the scale is correc
the depth of 80 feet would, if scaled, take 2
rear of lot 20, which abuts on the rear of lo

According to that plan, Foster place is
throughout, and the front of plaintiff's hous
pears to be on the street line on the north
place to the west; but in front of his house
father has enclosed by a fence a strip of lan
from east to west and 8 feet in depth, with
the front door of the house. The city corpora
some years ago, a granolithic pavement on th
Foster place, and when the west end of the
ferred to was reached, plaintiff claimed wha
thereby as his private property, and the gran
laid down in front of it; and plaintiff subsequ
a plank walk in front thereof.

A plan of the lots prepared by David Gibs
to the death in May, 1847, of Mr. Hagarman
may shew that plaintiff is entitled to the land

As plaintiff has been in possession of the
many years, and as the servants of the city
being rightfully there, it would be impossible,
of the unauthenticated plan produced at the
is encroaching on the highway.

There must be judgment for plaintiff as to
of the statement of defence, without prejudice
defendants or of any other person or of the
the city of Toronto to bring an action supp
tional evidence.

Defendants set up a counterclaim allegin
had allowed his house to become so out of repa
over to the east on defendants' premises and
to a portion of the fence and to the gate befor

Plaintiff's wife said that the east wall of th
same 35 years ago as it is now; and E. W. D.
known the house for 40 years, said that the wa
general aspect 20 years ago that it now ha
knows that the whole upper part was, 20 yea

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r to the east. Mr. Sewell, a surveyor, thought the house been originally built upon a slant, and says that there lean-over at the top of 6 or 7 inches; and Mr. Froude, a klayer, called by defendants, said a wall might have been t leaning as the wall of this house does.

In 1889 defendants erected a brick building on the line ding their land from plaintiff's, which would at the ndation be 8 inches from the east wall of plaintiff's house, when the building was completed the top of the wall ched the side of plaintiff's house, and above the wall of that ding the eaves of plaintiff's house for a distance of about feet project 7 inches over defendants' land. The brickrs were aware when the wall was completed that plains house touched and was overhanging.

Having regard to the evidence of Mrs. Foster and Mrs. ler, and after viewing the locus, I am of opinion that the se was leaning over the land now owned by defendants some years before 1889, and that at the time this action brought it was so leaning for over 20 years. Neither the ndants' fence nor gate was injured by plaintiff's house.

There must be judgment for plaintiff dismissing the counaim with costs.

MARCH 26TH, 1907.

DIVISIONAL COURT.

TASKER v. SMITH.

tion—Action for—Beneficiaries under Trust Deed—Subission to Arbitration—Award—Provision for Option of urchase—Exercise of Option—Release — Conveyance—stoppel—Costs.

ppeal by defendant from judgment of MAGEE, J., ante eclaring plaintiff entitled to an undivided one-fourth st in certain lands, free from any right of defendant to ase the same, and for partition or sale, etc.

. H. Blake, K.C., and W. D. Gwynne, for defendant.

H. Ritchie, K.C., for plaintiff.

e judgment of the Court (MEREDITH, C.J., MACMAHON, GLIN, J.), was delivered by

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ANGLIN, J.:—The action arose out of ar
upon an arbitration under voluntary submi
plaintiff was awarded an undivided one-four
the lands in question; but the arbitrators "fu
and adjudged that if the said Annie Smith
6 months from the date hereof to purchase
lot lettered 'D,' awarded hereunder to Louisa
shall be entitled to do so for the sum of $37
ment of the said sum the said Louisa J. Taske
a proper conveyance of her interest in said lo
Annie Smith."

The submission merely empowered the arb
vide and partition certain parcels of lands, of
was one, amongst the plaintiff, the defendant,
sons; to direct that any parcel might be held b
the benefit of all or some of such persons; and
payments as might be necessary to make owelt

Shortly after publication of the award defe
tice of her intention to buy plaintiff's interest
tendered the price; but plaintiff challenged t
the direction requiring her to convey her inter
defendant for $375. The sufficiency of the not
is admitted. Correspondence ensued, in the co
the solicitors for plaintiff suggested that convey
to each of the parties to the submission of the i
lands severally awarded to them by the arbit
them "to their legal rights" (20th November,
veyances were executed by all parties in De
which gave to each the interest awarded. The
plaintiff included an undivided fourth interes
and contained a release, in the statutory shor
right, title, and interest of the parties of the th
to, of whom defendant was one, in and to the la
In none of these deeds is any reference made to
purchase which the award purports to give to d

The trial Judge held that this deed put a
right of purchase which defendant might have

Before us it was contended that the lands w
ject to any right of defendant under the pr
award purporting to confer upon her an optio
and counsel relied upon the letter of 20th No
above referred to. The conveyances were execu
a year afterwards, and when nearly two years a
expired since the publication of the award.

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ces I should hesitate long before venturing to differ
e view entertained by my brother Magee as to the
the release given by defendant.
if that release is not conclusive against defendant,
only succeed by establishing that the provision of the
urporting to confer upon her an option to purchase
's interest in lot D is valid; or, if invalid, that it
be separated from the valid portion of the award, and
e vitiates the whole.
this direction was entirely outside the scope of the
ion is, I think, unquestionable. It is not division or
; neither does it provide for retention of any part of
ls in trust for the common benefit of all or several of
ties interested. Mr. Blake urged that it was an
of the power to make owelty of partition. Apart
e fact that another clause of the award purports to
for owelty of partition, a moment's consideration
t clear that this cannot have been the purpose of giv-
endant this option. If plaintiff's interest in lot D
$375 and no more, owelty of partition did not re-
at this option be given to plaintiff. If the lands were
nore or less than $375, the fairness and equality of
ition already made might be disturbed at the option
f the parties to the submission. If, as suggested by
ke, the share awarded Mrs. Smith was of less value
at given to Mrs. Tasker—the arbitrators were given
require Mrs. Tasker to pay to Mrs. Smith such sum
y as would compensate for such inequality. But to
s. Smith a right to purchase part of the interest of
sker at a fixed price—assuming the inequality con-
for by Mr. Blake, which is not conceded, and that
sfer of Mrs. Tasker's interest to Mrs. Smith, on re-
$375, would result in equality between them—would
legate to Mrs. Smith the power to make owelty of
, which the arbitrators themselves should have ex-
This provision of the award is, in my opinion,
n excess of the powers conferred on the arbitrators.
over, it seems to be distinctly severable from the rest
ward. There is nothing on the face of the award
ndicates that its other provisions in any way depend
is clause; and there is nothing to shew that in making
ition and in reaching the amounts of the payments
for owelty of partition the arbitrators were in any
ffected by the fact that they intended to insert this

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provision giving an option of purchase to Mrs. such a state of facts appears on the award th course take it into account: Bowes v. Fern 150, 161-2; Seccombe v. Babb, 6 M. & W. 1

If in this case the whole award must be because, though nothing appears on the face indicating, non constat that the other provisio would have been the same, if the arbitrato that they could not validly give this option no award containing any direction in excess conferred, could stand, because upon every s cisely the same argument might be made, have frequently been held good in part an excess.

Here, for aught that appears to the con award, this provision is quite independent o for division of the property and for payments of partition elsewhere ordered. The partition and the payments can be made—in fact both complished—without reference to Mrs. Smith chase part of Mrs. Tasker's interest. The Cou ly towards upholding such part of an award submission: Kendrick v. Davies, 5 Dowl. 69 Cheape, 5 Dow 247, 265.

The provision of the award which purpo defendant an option to purchase is in excess conferred by the submission, but because sev other portions of the award, which are clea powers, its vice does not affect the validity of tions.

The appeal therefore fails and will be costs.

CARTWRIGHT, MASTER. MAR

CHAMBERS.

OUTERBRIDGE v. OLIPHAN

Discovery—Production of Documents—Letter of Defendant's Agents—Refusal of Agents

Motion by plaintiff to strike out statement non-production of letters between defendant's here and in Washington.

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. Kilmer, for plaintiff.

. Macdonald (Curry & Co.), for defendant.

MASTER:—These letters are obviously very material iff's case. It is said in answer to the motion that nto agents refuse to give them up, and an affidavit yre (one of defendant's solicitors) to that effect has l, setting out the correspondence between his firm agents as evidence of their refusal.

n Bray on Discovery, p. 195, it is said: "It is no or non-production for the party to state that his or agent wrongfully withholds his (the party's) pa- e must satisfy the Court that he has taken all pro- ns to acquire them." In such a case, the learned ntinues, "the party must come to the Court for time he necessary proceedings to compel the production," aylor v. Rundell, Cr. & Ph. 104, 113.

t would not seem probable that there would be any , as the Toronto agents must have the letters sent by hington agents, and also copies of what they wrote

rder should go that defendant make production with- or as may be agreed. Costs of the motion to plain- ny event.

GHT, MASTER. MARCH 27TH, 1907.

CHAMBERS.

HERN IRON AND STEEL CO. v. SOLWAY & COHEN.

y—Examination of Officer of Plaintiff Company— ancy of Questions — Scope of Examination—Con- —Costs.

on by defendants for order requiring plaintiffs' presi- general manager to attend for further examination.

regor Young, for defendants.

. Gash, for plaintiffs.

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THE MASTER:—The action is on an all
defendants to supply 2,000 tons of scrap
from time to time. There is nothing in
fendants say that the contract was only for
it is admitted have been supplied. Defend
out and shew from plaintiffs' books that th
position to pay for 2,000 tons, and set up
even if the larger amount should be found t
tracted for.

On consideration I do not think this ca
not a case like that of Load v. Green, 15 M.
in Kerr on Frauds, 3rd ed., p. 53, and Be
5th ed., p. 458, cited by Mr. Young. Thi
material evidence in an action such as tha
a contract and get back the goods fraudule
untrue statements, etc. Here it would not
plaintiffs should always have assets sufficien
whole quantity undelivered. The contract
and as it would naturally have been, was to
tities as required by plaintiffs, and they se
in a way satisfactory to defendants until th
as to the quantity of iron which defendant
deliver.

Defendants also wish to find out how p
session of 3 cars of scrap, which were not co
and for which defendants have taken action a
Trunk R. W. Co. These cars contained ab
it is clearly a very important point whethe
livered to plaintiffs with or without the kno
sent of defendants.

Plaintiffs should therefore give discovery
defendants may know what evidence (if a
quired at the trial. If plaintiffs admit that
cars without any consent of defendants, t
will be necessary on this point.

As success has been divided, the costs of
be in the cause.

Plaintiffs may think it better to admit
these cars and so avoid any re-examination
coming on at Barrie in a few days.

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ITH, C.J. MARCH 27TH, 1907.

WEEKLY COURT.

HENDERSON AND TOWNSHIP OF MONO.

pal Corporations—Local Option By-law—Voting on—
Fixed for Taking Votes More than 5 Weeks after
Publication of Proposed By-law — Municipal Act,
338 — Imperative Enactment — By-law Quashed—
ts.

tion by Margaret Henderson to quash by-law No. 301
township of Mono, being a by-law to prohibit the sale
xicating liquors in the township, upon the ground,
others, that the day fixed for taking the votes of the
on the by-law was more than 5 weeks after the first
tion thereof, contrary to sec. 338, sub-sec. 1, of the
pal Act.

Haverson, K.C., for the applicant.

L. Island, Orangeville, for the township corporation.

REDITH, C.J.:—I think the by-law must be quashed.
338 of the Municipal Act, which governs the pro-
s to obtain the assent of the electors of a municipality
cal option by-law, provision is made that the council
by the by-law, fix the day and hour for taking the
f the electors, and the places in the municipality for
pose, as the council in their discretion deem best, and
the votes are to me taken at more than one place)
ame a deputy returning officer to take the votes at
uch place. The day so fixed for taking the votes shall
less than 3 nor more than 5 weeks after the first pub-
of the proposed by-law."

t is a very strong and clearly expressed provision, and
possible for me, I think, to disregard it and treat it
as something directory.

s essential to the exercise by the municipality of the
to pass such a by-law that that provision of the sta-
all be complied with. It is not for the Court to con-
hether the passing of the by-law a day or two before
y or two after the time when it might properly have

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been passed under the provisions of the Act d
The legislature has laid down the conditions up
power shall be exercised, and there is no powe
the Court to disregard the mandate of the legisl
respect.

In this case the first publication was on 29t
1906, and in the statutory notice appended to
the by-law the electors were informed that, in
their assent being obtained to the by-law, afte
from the publication of it in the Orangeville S
of which publication is Thursday 29th Nove
the hour and places therein fixed for taking the
electors, the poll will be held.

The date of the first publication was, ther
29th November, 1906. The taking of the vot
7th January following, so that more than 5 week
from the first publication, and the provision o
was therefore disregarded.

In re Vandyke and Village of Grimsby, 12 O
7 O. W. R. 739, 8 O. W. R. 81, referred to by M
no application. There, by mistake of the counc
cation had taken place, and, attention having b
the mistake, the council cancelled that publicatio
anew, publishing the by-law 3 times. It was h
had a right to do this, and that the second pul
one after the cancelled one, was the publication
be treated, for the purpose of the statute, as the
tion of the by-law.

It is very much to be regretted that the will o
will in this case be prevented from having effe
what may be thought to be in a certain sense a
jection, but there is no help for that. If the m
cers will not conform to the plain provisions of
the responsibility for the failure of the will of th
have effect rests upon them and not upon the C
is to administer not to make the law.

It may be that the result of such cases as th
satisfy the legislature that some provision ought
giving to the Court a wider power to refuse to qu
where the Court is satisfied that the omission to
the statutory enactments has not affected the res
the legislature has not gone that far, though it
considerable distance, by permitting the Court
irregularities in taking the vote where the result

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y them; but there is no legislation, as far as I am
hich permits the Court to hold that where the vote
taken in direct contravention of the provisions of
te, the by-law can be upheld.

by-law must be quashed. I think that, under the
nces, I should not impose costs upon the munici-

MARCH 27TH, 1907.

DIVISIONAL COURT.

LATTA v. FARGEY.

*ion—Slander—Privileged Occasion—Qualified Privi-
— Malice — Evidence of—Disagreement of Jury—
uit.*

al by plaintiff from judgment of BRITTON, J., 9 O.
31, dismissing with costs (after the jury had dis-
an action for slander.

Drayton, for plaintiff.

Morden, Belleville, for defendant.

COURT (MULOCK, C.J., ANGLIN, J., CLUTE, J.), dis-
e appeal with costs, ANGLIN, J., dissenting.

MARCH 27TH, 1907.

DIVISIONAL COURT.

TLES v. CANADIAN PACIFIC R. W. CO.

*—Agent Pledging Credit of Principal—Debts In-
l by Agent—Payment by Principal to Agent—Agent
cting to Pay Creditors—Creditors Estopped by Con-
from Recovering from Principal—Receipts—Repre-
ions that Agent had Paid Creditors — Principal
ing Position on Faith of.*

al by defendants from judgment of MAGEE, J., in
plaintiff in an action to recover $407.75, balance

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alleged to be due to plaintiff by defendants
"teams and horses" and the board and lodgi
of men employed by defendants in connection
way work in the vicinity of Parry Harbour.

Angus MacMurchy and J. D. Spence, for
R. McKay, for plaintiff.

The judgment of the Court (MEREDITH
HON, J., TEETZEL, J.), was delivered by

MEREDITH, C.J.:—An engineer named
charge of a party engaged in this work, and
quest that the firm of Gladstone & Gentles su
and horses and the board and lodging.

It was but faintly argued by counsel for
Keemle had not authority to pledge the cred
in the transactions between him and the firm
Gentles, and, if the only question involved in
his authority to do this, we should not diffe
clusion of my brother Magee, who determin
favour of plaintiff.

The principal defence is, however, that,
Keemle had authority to pledge the credit of
conduct of Gladstone & Gentles has been suc
then from recovering.

The course of dealing between Keemle
was that they furnished him at the outset wi
was intended and supposed to be sufficient t
pay the bills which he incurred, and that,
payments made by him were sent in to their of
the account of Keemle was credited with the
according to these vouchers, he had disbursed
his account shewed that the advances which
to him were exhausted, or nearly so, furthe
sent to him.

Gladstone & Gentles made out their ac
Keemle their debtor, sometimes adding the le
after his name, and accounts for all the ite
claim sued for consisted were made out in
payment of them was acknowledged by the
written at the foot of the accounts.

These receipted accounts were forwarded
defendants' office, and, defendants in good fai

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accounts had been paid by Keemle out of the moneys which he had been furnished to pay them, the amount of accounts was credited to Keemle's account, and further nces were from time to time made to him on the faith at having been done, with the result that when Keemle the employment of defendants there was at his credit $27.50, and that sum defendants have paid to Glad- & Gentles on account of their claim.

Before the course of dealing to which I have referred was ted, the practice was for the accounts to be forwarded ugh Keemle to the head office of defendants, and pay- of them was made directly to the person entitled to re- the money, who then signed a receipt on a printed form owledging payment of the account by defendants.

On this state of facts defendants contend that the con- of Gladstone & Gentles amounts to a representation by to defendants that Keemle had paid the accounts which rm had acknowledged payment of, that defendants were fied in relying and did rely on these representations, and ed their position on the faith of them, and that Glad- & Gentles are estopped from setting up, to the prejudice efendants, that the accounts were not in fact paid by nle.

Counsel for plaintiff argued that defendants were not en- l to invoke the principle of estoppel in their favour, be- e, as he contended, Gladstone & Gentles were induced to pt their accounts by the representation of Keemle that is necessary that they should be sent to the head office of ndants in duplicate and receipted in order that the unts due should be forwarded to him, and that when he ived the cheques from defendants he would pay the ac- ts.

The evidence adduced by plaintiff as to the payment of account of 1st February, 1905, incurred by Dibblee, an- r of defendants' engineers, appears to me to be an answer he contention of plaintiff's counsel, for that account was receipted, but was sent in to defendants through Dibblee, hed by him as being correct, and paid on the 17th of the e month to Gladstone & Gentles, so that at the very time n, as is now contended, they were deceived by the state- t of Keemle as to the necessity of their accounts being ipted before being paid, they were in possession of evi- ce that there was no such necessity, and that the ordinary

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business course, that adopted in the Dibblee c
adopted by defendants.

The letter of defendants' division enginee
Fronhoefer, one of the assistant engineers, of 3r
which was relied on by plaintiff's counsel, whil
probably does afford evidence that the latter had
pledge defendants' credit for board and sup
against plaintiff on the branch of the case with
now dealing, as it shews that the accounts we
receipted before being paid, but were to be sent
ants for payment, vouched by Fronhoefer.

In my opinion, the case falls well within th
by Mr. Bowstead in his work on Agency, 2nd
"Where a debt or obligation has been contracte
agent, and the principal is induced by the condu
ditor to reasonably believe that the agent has p
or discharged the obligation . . . and in co
such belief pays or settles or otherwise deals to
with the agent, the creditor is not permitted to
tween himself and the principal, that the debt h
or the obligation discharged." Wyatt v. Hert
147, which is referred to by Mr. Bowstead, suppo
ment of the law.

The recent case of People's Bank of Halifax
S. C. R. 429, in which the leading authorities o
of estoppel by conduct are reviewed, well warra
clusion that plaintiff is estopped by the conduct
& Gentles from denying, as between himself and
that the receipted accounts were paid by Keeml

The conduct of Gladstone & Gentles in ref
criminal prosecution of Keemle, and the corres
tween their manager and Keemle, point to th
that Gladstone & Gentles intended, by receipt
counts and handing them receipted to Keemle, t
for payment of them, and that they treated him a
to receipt payment. I do not think, however, th
sary for the success of defendants that such
should be reached.

Upon the whole I am of opinion that the app
allowed with costs, the judgment of my broth
versed, and, instead of it, that judgment shoul
dismissing the action with costs.

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MARCH 27TH, 1907.

C.A.

J. D. SHIER LUMBER CO. AND TOWNSHIP OF LAWRENCE.

MICKLE, DYMENT, & SON AND TOWNSHIPS OF HERBORNE, LIVINGSTONE, AND McCLINTOCK.

ssment and Taxes—Property Liable to Assessment—Timer Licenses—Interest of Licensees—Real Property—Interest of Crown—Lumber Camps—Temporary Structures —Slides and Dams—Business Tax.

'ases submitted by the Lieutenant-Governor in council, uant to sec. 77 of the Assessment Act, for the opinion of Court of Appeal.

Four questions were submitted:—

1) Are the holders of timber licenses liable to be assessed on?

2) Are lumber camps assessable?

3) Are the owners of lumber camps assessable to a busi- tax under the conditions mentioned with respect to the s only?

4) Are slides and dams assessable under the conditions ioned?

he cases were argued before MOSS, C.J.O., OSLER, GAR- MACLAREN, and MEREDITH. JJ.A.

. D. Armour, K.C., and H. W. Mickle, for the company rm above mentioned.

G. Mills, for the township corporations.

oss, C.J.O.:— . . . The first question presents for eration the inquiry whether a timber license from the is as such to be treated as "real property," within the ng of sec. 5 of the Assessment Act, so as to be liable to on. If it is not real property, but personal property, ot liable to taxation.

estions have not infrequently arisen as to the rights of s of timber licenses, and incidentally as to the nature uality of a timber license, but I am not aware that the

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present question has ever been raised under Assessment Act or in any other way.

By R. S. O. 1897 ch. 32, sec. 2, it is pro Commissioner of Crown Lands (now the Min Forests, and Mines), or certain officers authoriz grant licenses to cut timber on the ungrante Crown, but no license shall be so granted for than 12 months from the date thereof.

By sec. 3 (1) the licenses shall describe which the timber may be cut, and shall confe being on the nominee the right to take and possession of the lands so described, subject tions and restrictions as may be established.

The licenses issue by the authority of R. subject to certain regulations imposed by the ch. 9 and 63 Vict. ch. 11, and to certain oth imposed by orders in council. They are signe ister of Lands, Forests, and Mines, and on the to be given by him. The language is: "I unto . . . and unto his agents or workn and license to cut every description of timber . . . and to hold and occupy the said loca clusion of all others except as hereinafter ment day of , 19 , to th April, 19 , and no longer . . ." Then exceptions to the right of exclusion, e.g., liber son or persons to make and use roads upon the ground licensed, the right to take from the by the license standing timber, without comp used in the making of roads or bridges or pub on behalf of the province under the authority ment, and no interference with settlers under ity or title in clearing and cultivation. The excluded either expressly or by implication.

It will thus be seen that the right to take sive possession of the lands described in lice given by sec. 3 of R. S. O. ch. 32, is subject and limitations materially modifying its effect considered with reference to sub-secs. (2) and which shew the property vested in the lice contra-distinguished from the mere right con sec. (1). The licenses shall vest in the hold rights of property whatsoever in all trees, tim ber cut within the limits of the license during

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, whether the trees, timber, or lumber are cut by the au-
ority of the holder of the license or by any other person
th or without his consent, and the licenses shall entitle
e holders thereof to seize in revendication or otherwise such
es, timber, or lumber, where the same are found in the
ssession of any unauthorized person, and also to institute
y action against any wrongful possessor or trespasser, and
prosecute all trespassers and other offenders to punishment
d to damages, if any.

That which is vested in the holder of a license is the pro-
rty in the trees, timber, and lumber cut within the limits
ring the term of the license; and to enable him to enter
d cut and to protect his property in all trees, timber, and
mber that may be cut during the term of the license, the
nt of possession is given him for the same period. The
riod is restricted to a year from the date of the license, and
t there is no legal or equitable right to an extension or
enewal seems to be settled by authority. . . .

[Reference to Muskoka Mill and Lumber Co. v. McDer-
tt, 21 A. R. 129, per Osler, J.A., at p. 132; Smylie v. The
een, 27 A. R. 172, per Maclennan, J.A., at p. 185.]

Can it be fairly considered that a license of this nature,
ing the holder a right to cut trees, timber, and lumber,
l a property in them when cut, with an ancillary right of
session, the whole for a very limited period, without any
al or equitable right of renewal or extension, comes with-
the contemplation of "real property" as used in sec. 5 of
Assessment Act? Or is there anything in it to remove
land from the category of property of the Crown exempt
n taxation?

The land remains undoubtedly the property of the Crown,
lo also the trees and timber until they are cut. Until that
been done they belong to the land and to the Crown.
. [Reference to Smylie v. The Queen, 27 A. R. at p.
, per Osler, J.A.] The right to cut does not divest the
wn of the property in the timber. To accomplish that
e must be an actual severance. Upon severance the tim-
vests in the licensee not as real property, but upon, well
erstood principles, as personal property. Then, for the
time, the title is changed, together with the character of
property. If the interest of the Crown in the real pro-
y covered by a license to cut timber is taken out as ex-
t from taxation, what remains of real property liable to
tion?

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The substance is that the holder of a license
to convert into personal property and to the
title to himself in that which until the act o
real property belonging to the Crown. There
pear to be any head under which this right to
tendant right to possession can be ranked as
under the Assessment Act.

There is no doubt that the right of the lice
been held to be an interest in lands within t
sec. 4 of the Statute of Frauds—and properly
gard to the language of that section, viz., "N
be brought upon any contract or sale of lands,
hereditaments, or any interest in or concernin
Macdonell v. McKay, 15 Gr. 391, it was p
Spragge, V.-C. (pp. 394, 395), that an intere
used in the statute, is not to be taken as syn
real estate, nor is it to be assumed that that
statute does not deal with personal as well as r
Bennett v. O'Meara, the report of which imme
that of Macdonell v. McKay, the same learn
that a Crown timber license was personal p
quite apparent, therefore, that he was of th
there was no inconsistency in the two position
though a Crown timber license is personal pro
ment or sale of it is within the Statute of Fr
Hoeffler v. Irwin, 8 O. L. R. 740, 4 O. W. R. 17
from the judgment in Bennett v. O'Meara
Chancellor Van Koughnet was also of the opin
licenses were personal property. I am prepare
view of these two learned Judges on the questi
that timber limits are not real property lia
within the meaning of sec. 5 of the Assessmen

This conclusion appears to render it unne
sider the effect of sec. 35 of the Assessment
strongly relied upon by Mr. Mills in his able
fore us. But I may say that it appears that t
reference to an entirely different class of pr
real property which has been granted to an ind
which the Crown has acquired an interest, e.
The section is new, and may probably have be
remove all doubts as to the liability of the
mortgagor under the Crown or his tenant to
sold for arrears of taxes. See Regina v. Cou
ton, 17 A. R. 421, and S.C., sub nom. Quirt v.
S. C. R. 510.

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ming now to the second question, it appears from the ent of facts that the camps are mere temporary sta- n the woods, where there are shanties and other tem- erections for the housing and feeding of the men and engaged in the work of cutting and getting out the and the storing of the vehicles and implements in use ese purposes. They are removed from time to time ne part of the limits to another as occasion may re- and it is quite possible that they may be in one muni- one day and in another the next. There seems to ground on which they could be treated as liable to taxa-

to the third question, a reference to the provisions of , under which a business tax is imposed, shews that ave no application to the circumstances stated in the

e holders of the licenses are manufacturers of lumber, other municipalities, and there occupy or use land purposes thereof, and are there assessed for a business The work they are carrying on in the limits does not thin the description of any of the kinds of business rated in sec. 10. Nor are they occupying or using hich is subject to taxation for the purposes of any such s. That the land occupied or used must be land sub- taxation seems apparent from the wording of sec. 10. ovision is that the sum to be assessed as a business as- nt is to be computed by reference to the assessed value land occupied or used.

to the fourth question, the statement of facts shews les and dams mentioned to be temporary constructions upon Crown property merely for use in facilitating sage down the streams of the logs and timber cut and on the limits. They may or may not be situate on its covered by the licenses. They are used by all per- ing the streams for the floating down of their logs and and when no longer required are abandoned. There t appear to be any ground for assessing them under t.

these reasons, I answer all the questions in the e.

ER, J.A.:—I agree in this opinion, and do not think ssary to add anything.

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GARROW and MACLAREN, JJ.A., also ag
stated in writing.

MEREDITH, J.A.:—The 5th section of
that all land in the province shall be taxed:
Crown lands in question: but by the first su
section the "interest" of the Crown in al
exempt: this sub-section therefore exempts f
whole of the interests of the Crown in the la
and, if such interests comprise everything,
lands are exempt; but, if not, if there is a
in the lands, it is taxable, unless otherwise e

Take out of the lands in question the
the Crown, and there yet remain interest
interests of the licensees—and it is immater
interests are inheritable estates or not; or
demises or not; they are interests in the lan
exempt as interests of the Crown, and so
being otherwise exempted.

It is not contended that the timber wh
have the right to cut has been, either in fac
verted into chattels: it is yet part of the lan

If the licensees carry on any taxable b
lands, they are liable to a business tax base
of the taxable interest in them, but mere
the trees and converting them into logs wher
so that they may be conveniently moved, w
opinion, be such a business.

All structures owned by the licensees an
the value of their interests in the lands ar
of such interests, not separately.

MULOCK, C.J. MA

WEEKLY COURT.

COPELAND-CHATTERSON CO v. BU
TEMS LIMITED.

*Contempt of Court — Disobedience of Inju
Contempt—Company—Sequestration— I
—Apology—Reparation—Fine—Costs.*

Motion by plaintiffs for an order directi
writ of sequestration against the estate of de

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orated company) for contempt of Court in having dis-
ed the injunction contained in the judgment of the
Judge, Clute, J., pronounced on 22nd December, 1906,
ted 8 O. W. R. 888.

V. E. Raney, for plaintiffs.

V. H. Irving, for defendants.

ULOCK, C.J.:—The trial Judge on delivering judgment
ted a stay of 30 days. The stay expired on 22nd Janu-
and thereupon it became the duty of defendants to obey
njunction. Nevertheless they did not do so, but, on the
ary, continuously disregarded it throughout the whole
d from 22nd January until 4th March, when the
f Justice of Ontario, on motion of defendants, directed
the execution of the injunction be stayed until the dis-
ion of the appeal in the case, upon defendants undertak-
o keep an account and to file every two weeks a copy of
account verified by affidavit: ante 390.

On this motion defendants admitted breach of the in-
tion as above mentioned, but their counsel stated by
of excuse that compliance with it would have caused
to disband their staff of skilled workmen, numbering
100, would have disorganized their business, and other-
have occasioned them serious financial injury; and that
had obtained a stay at the earliest possible moment.

These reasons do not, I think, furnish any justification
fendants' conduct. Their duty was to have unconditions-
obeyed the injunction so long as it was in force. In-
of doing so, they appear to have weighed the chances
to have reached the conclusion that it would be to their
cial gain to disobey it by continuing the prohibited
ess, and this they accordingly have done throughout a
d of about 6 weeks. This wilful disregard of the order
e Court has placed defendants in the position where
property may properly be sequestered. Before, however,
vrit is issued, they may, if they desire it, have an
tunity of purging their contempt, by presenting to the
a satisfactory written apology, by making the proper
ation for their act of disobedience, and by paying plain-
costs of this motion and of the reference herein dir-
as between solicitor and client.

s to the reparation due to the Court, it appears to me
defendants should not be allowed to profit by their

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conduct in breach of the injunction, and th
be required to pay into Court by way of a fi
to their profits accruing from sales made in
injunction. If such profits are less than $
should pay a fine of $250. Although the
fine is to be a sum equal to the profits, its
to be regarded as a disposition of the profits t
fendants may on or before 6th April, 1907,
their contempt, on these terms, by filing a
election with the registrar, and thereupon
reference to the Master to take an account
tioned. In default of such notice, the writ
to issue, and defendants to pay forthwith af
costs of the motion between solicitor and clie

ANGLIN, J. MARC

TRIAL.

NIXON v. MUNDET.

*Sale of Goods—Action for Balance of Price—
sideration—Manufactured Goods—Contra
Fulfil Requirements—Counterclaim for
Paid and Damages for Breach of Contrac
Evidence—Assignment of Plaintiff's Clain
—Refusal of Assignee to be Added as Pl
of Action.*

Action by a manufacturer in the city of
cover $360, the balance of the price of two
machines and two boxes, all made to the order
and shipped to them at New York. Count
fendants to recover $1,000 paid on account o
price, and for damages for breach of contra
alleging that the machines furnished did no
quirements of the contract and were incapab
use by them in their business as cork-makers.

C. D. Scott and MacGregor, for plaintiff.

F. P. Galt, for defendants.

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GLIN, J.:—At the trial, towards the close of plaintiff's ce in rebuttal, the fact developed that plaintiff had tely assigned her claim against defendants to one Wil- . Spence, for value, and that she has now no interest in bject matter of this action. Spence, who was called as ess for plaintiff, produced the assignment, which bears two days subsequent to that of the writ of summons in ction, and is absolute in form. He stated that this is not his, and is not being prosecuted for him or on count, but added that, if plaintiff should recover, he s her to pay him the proceeds of her judgment against lants. He refused to allow his name to be added as ntiff, however, or to have anything to do with or to ny responsibility for the action. Though given an unity, the solicitors for plaintiffs failed to induce Mr. to alter his attitude.

ving parted with all her interest in its subject matter, iff can no longer prosecute this action: Murray v. Wur- 9 P. R. 288; Johnson v. Thomas, 11 Beav. 501. The at notice of the assignment was not given to defend- y Spence takes the case out of sec. 58, sub-sec. 5, of dicature Act, but does not prevent the action being ed defective. The assignee having definitely refused dded as a party plaintiff, the proper course would seem to dismiss the action with costs rather than to direct of proceedings.

on the merits I would reach the same conclusion. iff failed to convince me that the machines furnished apable of turning out 125 cork crowns per minute, or hey could be operated without destroying an unduly ercentage of corks and crowns. On the contrary, de- ts have satisfied me that the machines fell far short requirements for which they stipulated.

endants' interest was clearly to keep and use these es if at all possible. Their anxiety to procure them e requirements of their business make this manifest. ood faith is further evidenced by the large payments n account of the price before acceptance. The fin- weakness of plaintiff, and the likelihood that defend- ll be unable to recover from her any moneys paid her ages allowed them make it highly improbable that uld reject machines which cost only $1,360, and upon hey had actually paid $1,000, if the machines were t for the work required of them.

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I was not favourably impressed with
Earl Nixon, one of the principal witnesses f
evidence of other witnesses as to tests mad
before shipment seems to me by no means

Apart from the difficulty arising from
her claim to Spence, plaintiff cannot succe

Upon their counterclaim defendants a
return of the sum of $1,000 paid to plain
their damages for breach of contract at
have the costs of the counterclaim as wel

MA

DIVISIONAL COURT.

ELGIE v. EDGAR.

*Equitable Assignment — Fund in Hands
gagees—Written Order by Mortgagors
Balance Due—Assignment by Mortgag
ants of Fund — Interpleader Applicati
Subsequent Interpleader Action — Di
Costs.*

Appeals by plaintiffs and defendant Cle
ment of TEETZEL, J., 8 O. W. R. 944, upo
interpleader action.

The appeals were heard by FALCONBRIDG
J., RIDDELL, J.

F. Arnoldi, K.C., for plaintiffs, cont
should be paid damages by reason of thei
tained an order of interpleader, and that t
to costs throughout.

C. J. Holman, K.C., for defendant Cl
that he was entitled to the full sum of $79

T. E. Godson, Bracebridge, for defenda

BRITTON, J.:—I quite concede, as cont
for defendant Clemens, that the order ma
favour of Edgar for $400 upon plaintiffs,

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ed by plaintiffs, is not in itself an equitable assignment, s not payable out of a particular fund—it does not the fund or debt out of which the payment is to be

e cases cited are conclusive upon that point: Hall v. , 17 A. R. 306; Thomson v. Huggins, 23 A. R. 191; al v. Dunn, 29 Ch. D. 128.

to the form Brends v. Dunlop, 90 L. T. 106 (1904), aps the strongest case against Edgar, but in that Brice nister, L. R. 3 Q. B. 569, was approved. Here the requesting plaintiffs to pay are as absolute and so as ve as the words "I do hereby order, authorize, and t you to pay," as in Brends v. Dunlop.

en, is extrinsic evidence, in writing or parol, admis- o shew the intention of the parties—and to so designate nd as to constitute this order an equitable assignment? also seems to be fully covered by authority: Lane v. nnon Driving Park Assn., 22 O. R. 264; Redick v. ll, 1 DeG. M. & G. 763.

es the evidence in this case make out an equitable as- ent in favour of Edgar?

eling had a saw mill, was getting out logs, manufactur- ese logs into lumber, and was selling the lumber to iffs. Edgar had a mortgage upon the logs and lumber ling.

11th July, 1905, Sieling and plaintiffs entered into an nent in writing for the sale by Sieling to plaintiffs of e hemlock, birch, pine, and ash lumber then cut, and ight be cut during that season, subject to certain pro- and to be paid for as set out in that agreement. To greement Edgar was a subscribing witness.

ere was correspondence between plaintiffs and Edgar the lumber plaintiffs were getting, and as to shipment eling, and to some extent as to how Sieling was carry- t his part of the agreement with plaintiffs.

25th July, 1905, Edgar received from plaintiffs $700, ently on account of his claim, paid by plaintiffs on ac- of the Sieling lumber, and Edgar wrote acknowledging , and agreed with plaintiffs to hold his chattel mort- on the Sieling lumber until 1st September following. iffs paid the Edgar mortgage, and on 4th September, took a chattel mortgage from Sieling to themselves ll the stock of logs and lumber situate upon the shore on Eagle lake in the district of Parry Sound, and upon

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all logs that Sieling" might bring there, an
ber to be manufactured from them, &c., &c.

Plaintiffs continued to make advances a
Sieling for lumber. Sieling continued to r
ship lumber to plaintiffs, and Sieling continu
edge of plaintiffs, to deal with Edgar, wh
merchant at Sundridge.

On 26th January, 1906, Edgar wrote
important letter as to the creditors of Si
threatened proceedings by persons from wh
chased his mill, and he enclosed cheques wh
handed to him for that purpose.

On 1st February, 1906, Edgar wrote to p
ing them that lumber of Sieling had been
and advising plaintiffs to send cheque to
so that teams could "get hauling." In that
plaintiffs that Sieling then owed him, Edgar,

After that and before 8th February Edga
of plaintiffs' firm, had a conversation abo
stood or would stand with plaintiffs in rega
to be paid by plaintiffs for the Sieling lum

On 8th February plaintiffs wrote to Ed
"Referring to your conversation with Mr.
Mr. Sieling's account, we figured that he wil
after our account is paid off, and which m
considerably more, and you can govern yo
ingly."

To this Edgar replied on the 9th Februa
you for your information re Sieling. I thin
will get an order on you from him, and h
and I can wait until you get the lumber tu

On 15th February the order from Sielin
and was enclosed by Edgar in the followin
date to plaintiffs: "Enclosed you will find
Sieling for $400. He owes me about $275, b
me getting an order for the $400, as he is wa
and I gave him $45 to-day. The mill people
trouble about the logs he has at Eagle lake,
testing their claim. He is loading three car
the Stratford firm."

The receipt of this order was not acknov
and on 6th March Edgar wrote to plaintiffs
ago I sent you an order from J. Sieling for $
had any acknowledgment of same. If ord

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ou kindly acknowledge, and also state when you will pay it. ly reason for being so particular is that are a few more rders on me and annoying me for payment; besides, I am nformed that he is going out to the west in about a week 10 days and taking 2 or 3 teams of horses with him, and do not want to let him off without knowing that order accepted in whole or in part."

To this letter plaintiffs replied on 10th March: "We are receipt of your favour of the 6th instant, and have delayed nswering your letter as we expected Mr. Elgie would have een in Sundridge. We received the order signed by Mr. ieling to you for $400. We are not yet paid off ourselves on r. Sieling's account; however, we will apply this surplus on ccount of this order as soon as we are clear ourselves. We pect Mr. Elgie will be up on Monday, when he will see ou."

Other evidence was given. This evidence, in my opinion, akes specific and designates the fund out of which the $400 as to be paid, and so an equitable assignment has been made t.

It is in evidence that Elgie stated that this amount was edited to Edgar upon plaintiffs' books, but, whether it was fact credited to Edgar or not, the amount of it should have en by plaintiffs charged to Sieling, and should have been cluded in plaintiffs' statement of account given to Clemens. aintiffs not having done this should not affect Edgar to his ejudice. The money in Court is practically surplus. It at all events part of a fund out of which Edgar was to be id, and, as between plaintiffs and Sieling, plaintiffs had the ht to pay the $400 to Edgar and to charge it to Sieling.

On 2nd April Sieling assigned to Clemens all his "right, e. and interest, of whatever kind, in all lumber, timber, od, machinery, lands, book accounts, bills of any kind, and ses in action" then possessed by Sieling or in which ling had an interest.

There was also on that date a formal bill of sale from ling to Clemens, the stated consideration in which is 00 and the payment by Clemens of the chattel mortgage to intiffs, on which it is stated that $796.70 was then due. same day Clemens notified plaintiffs of the assignment ject to plaintiffs' chattel mortgage, and claiming all sur- s money after payment of the chattel mortgage.

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Plaintiffs acknowledged receipt of this, but
Edgar, and apparently did not notify Clemen
order until some later day. Plaintiffs' letter
4th May states—inter alia—"As we advised
two orders from Mr. Sieling to pay moneys
Brubacke, of Berlin, and to Joseph Edgar,
and we are in hopes of hearing from Mr. Siel
this matter also." On same day plaintiffs wr
notifying him of the claim of Clemens. Edg
then accrued. Whatever mistake plaintiffs ma
them and Clemens, if any mistake was mad
affect Edgar. Plaintiffs apparently forgot
order until some day after 5th April, 1906,
4th May.

It seems rather a pity that there has been
so much litigation about the matter, when there
if anything, in dispute as to the facts of the

Both appeals dismissed with costs payable
to Edgar—but no other costs.

RIDDELL, J., gave reasons in writing for
clusion.

FALCONBRIDGE, C.J., concurred.

MARCH

DIVISIONAL COURT.

WRIGHT v. ROSS.

Sale of Goods—Machinery—Written Agreeme
—Breach—Failure to do Good Work—Al
Return of Machinery — Waiver of Right—
struction of Contract—Return of Notes Gi
—Delivery up of Securities—Damages.

Appeal by defendants from judgment of
dated 27th November, 1906, in favour of plaintif
with costs, in an action for breach of warrant

The appeal was heard by MEREDITH, C.J
CLUTE, J.

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G. Lynch-Staunton, K.C., and A. W. Marquis, St. Cathines, for defendants.

J. M. Glenn, K.C., for plaintiffs.

CLUTE, J.:—Plaintiffs entered into a written agreement nder seal for the purchase of a thresher from defendants, be shipped on or about 10th July, 1905, from St. Cathines to plaintiffs at Springfield. Payment was secured by rtain promissory notes and a chattel mortgage as collateral the notes, the first note to become due on 1st November, 905; property not to pass until payment made in full; prosion for acceleration of payments, with numerous other rovisions, among which is one that, in case plaintiffs abanon, neglect, or misuse the same, defendants may, without ritten consent, resume possession thereof and sell by public ction or private sale, and, after deducting all expenses, edit only the net amount received in cash, the purchasers reeing to pay any deficiency forthwith. In case possession the goods or machinery be resumed, the purchasers authize the vendors to sell the same, if they desire, without comying with any of the requirements of R. S. O. ch. 149 or nending Acts. The contract contains the following warnty: "The above machinery and goods are warranted to be ll-made of good material, and, with good care, proper age, and skilful management, to work properly and do good rk. Defects or failure in one or more parts of said manery or goods shall not afford grounds for condemning or urning the whole or any other part. This warranty is good 5 days only after starting, and written notice of any comint must be given to the vendors at their head office, and through the agent through whom purchased, before the piration of said 5 days, stating in detail wherein this rranty is not satisfied; and reasonable time thereafter ll be given to the vendors to send competent workmen to edy the difficulty, the purchasers agreeing to render essary and friendly assistance with men and horses gratuisly, if requested, and the vendors to have the right to ree any part or parts within reasonable time; after which nything is not in accordance with this warranty, it is to be rned by the purchasers to the place of shipment free of rge, without delay, and the vendors shall then have the t to substitute other parts or machines therefor, within onable time, on the same conditions, and under and sub-

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ject to the terms of this contract. Failur
trial or to give such notices within said 5 da
clusive evidence of the due fulfilment of
vendors. When at the request of the pur
sent to operate said machinery and find t
carelessly or ignorantly handled to its injur
work, the expenses so incurred shall be p
chasers and form part of the debt secured ur
of this agreement. This warranty shall be
case the purchasers perform fully all their o
this agreement, and it shall be void in the ev
sentations or statements made by the purchas
No remedy other than the return of the d
machine shall be had for any breach of warr
ranty does not apply to second-hand mach
on the vendors' part under this warranty shal
chasers to the return of their money and n
no warranties, guarantees, or agreements, ex
other than those contained herein; and the
be held responsible for any statements made
any way, or by any person, in connection w
unless expressed in this contract. It is also
no money is to be paid on account herein
without a written order of an officer of
the head office."

The machine did not arrive until 1st A
a trial it would not do good work or even
within the 5 days mentioned in the warrant
defendants notice in writing, and thereupon
by defendants to endeavour to make it w
peated attempts, he confessed that he could
trial Judge finds, upon evidence that full
finding, that he failed and acknowledged t
rectify what was wrong and to make the m
work. After some 40 days of delay anoth
by defendants, and he failed. Then, afte
general agent, the sales agent of the vendo
to take the machine to Springfield.

The trial Judge finds that it was know
that the machine was at Springfield; that
the members of the firm of defendants, sa
it there in October, 1905;" and, instead of
transaction . . . they treated this mac
doned machine and proceeded to enforce t

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hich was given as security for the notes, half a month any of the payments were due, still not in terms re-ing the return of the machine to Springfield.

is action was commenced in January, and still noth-as said about the particular complaint that is now of it not being sent to St. Catharines, and in Febru-r. Ross took formal possession of the machine. By that and selling it, the Judge finds that he must be d to have accepted the return of the machine in ary. It was not disputed on the argument that the ne would not do good work, and that the man sent endants to repair it could not make it do good work. ntention was, however, that plaintiffs abandoned the ne, and that in such a case the agreement provides ne purchase money and the notes and securities given or shall immediately become due and payable, and nder the agreement they had the right thereupon to e machine and give credit for the amount received.

was further contended that what was done, in the way eiving and selling the machine, was not a waiver of ight to have the machine returned to St. Catharines; ney never did in fact accept a return of the machine; at there was no breach of the warranty.

will be seen from a perusal of the warranty, as above t, that if not contradictory it is obscure. One clause es that "the defects or failures in one or more parts l machinery shall not afford grounds for condemning urning the whole or any other part." That seems er to the case, not as in the present, where the whole ne would not do good work, but has reference to a ular part which may be replaced. It is plain, I think, er, that the notice which is to be given within the 5 stating in detail wherein the warranty is not satisfied, notice intended to be given when that which may con-a breach of warranty is complained of, and this has no reference to the return to the place of ship-because after the notice is given and after a reason-ime is given to the defendants to send competent en to remedy the difficulty, it is then that the ma-is to be returned to the purchaser to the place of ship-and the defendants shall then have the right to sub-other parts or machines therefor within a reasonable subject to the terms of the contract. If this means he defendants have the right to go on from time to

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time, even after the machine is sent to the
ment, to substitute other parts or machines
that all the conditions are made to apply, th
never come, apparently, when the bargain wou
the purchasers be entitled to a return of th
securities. But this evidently is not the true
because further on in the warranty is this cl
type and as a distinct sentence: "Failure on
part under this warranty shall entitle the pur
return of their money and notes." This is the
of the warranty. This it was, doubtless, upon
tiffs relied, and the whole agreement ought to
to make this clause effective. As the trial Ju
served, this contract is a one-sided contract.
contract. It is a contract which might induc
ture to intervene and to say that in such a
Judge might pronounce upon its reasonablen
have to deal with it as it is, giving it a reason
tion, having regard to the one clause in favou
chaser.

I think the fair meaning of the warrant
is, that if, under all the circumstances, def
had a reasonable opportunity to make the
properly and to do good work, and fail to do
chasers are entitled to a return of their money

I do not think, on the facts in this case, th
can rely upon the non-return of the machine t
shipment to defeat a clear breach of their wa
return was to give the defendants the right
other parts or machines therefor within a rea
etc. It was not to entitle, immediately thereup
tiffs to a return of their notes. The return of
ties depended upon the failure of the defend
the machine "work properly and do good wor
ants, knowing the facts, did not pretend th
ready to do anything further with the machine
required the machine to be returned, but
through their agent, directed what was to be
machine to enable them to put it in proper
what was, to take it to Springfield, to have i
their own men. This was done. It still wou
and after an unreasonable delay of 40 days,
other man, and he is not able to make it w
The machine having been left at the place

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:ted to be sent, the defendants having twice attempted ıake the machine work and having failed, it being left e at their request, and nothing further asked and noth- further done in the way of making the machine do l work, the proper inference is, that they could not make ı good work, and had decided not to try, and that the ch of the warranty was complete. The return to St. ıarines is not part of the warranty and no part of the ch. It is a clause inserted to enable them to endeavour ıer to make the machine work well. The covenant not say that upon the return to the place of shipment purchasers shall be entitled to their money and notes, that failure on the vendors' part under the warranty l entitle the purchasers to a return of their money and s. The chattel mortgage was collateral to the notes, as nothing ever became due on the notes, there was right to sell under the chattel mortgage, and plaintiffs entitled to recover for the value of the property sold. amount assessed as damages is very reasonable, cer- ly not above the actual loss. I think the judgment of trial Judge should be affirmed, and this appeal dismissed costs.

MEREDITH, C.J., gave reasons in writing for the same lusion, distinguishing Hamilton v. Northey, 31 O. R.

MAGEE, J., also concurred.

MARCH 28TH, 1907.

DIVISIONAL COURT.

COOLEDGE v. TORONTO R. W. CO.

et Railways—Injury to Passenger Alighting from Car—Negligence—Contributory Negligence—Findings of Jury —New Trial.

Appeal by defendants from judgment of BRITTON, J., 222.

D. L. McCarthy, for defendants.

H. Cassels, K.C., for plaintiff.

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THE COURT (MULOCK, C.J., ANGLIN, allowed the appeal, set aside the verdict and directed a new trial, making the costs of the trial had costs in the cause.

GARROW, J. MA

C.A.-CHAMBERS.

CUMMINGS v. TOWN OF DUN

Appeal to Court of Appeal—Leave to Appea Divisional Court—Reversal of Judgment —Grounds of Appeal—Special Circumst —Restoration of Roadbed of Highway.

Motion by defendants for leave to appe of Appeal from order of a Divisional Court, ing judgment of STREET, J., 6 O. W. R. 168, and declaring plaintiff entitled to damages.

H. C. Gwyn, Dundas, for defendants.

H. W. Mickle, for plaintiff.

GARROW, J.A.:—The action was brought ages sustained by plaintiff by reason of def to repair Quay street, which forms the o plaintiff's lands. The disrepair consisted in store the roadbed of the highway after it h away by a neighbouring stream flowing th The conclusion of fact reached by Street, J action without a jury, was that the highv practical purposes been destroyed, that not repair, and therefore that the liability wa dismissed the action with costs. The I reached the opposite conclusion upon the c and awarded to plaintiff $25 damages to the of the action and a reference as to subseq

The question is certainly one of some r the whole I agree with the conclusion reach sional Court.

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ıe damages are small, and, although it is argued by dants, not without reason, that more is involved—that t what really is involved is defendants' liability to re- the highway, which will cost, it is said, $800 or over— e been quite unable to reach the conclusion that it be proper, in all the circumstances, to assist defend- o continue the litigation. The matter in issue, al- h small in mere present damages, is of great conse- e to plaintiff. His access is probably cut off. The is an absolute necessity to him to reach his lands ouses. And it is also, it must be assumed, of use to ıblic generally, and should be restored. That it can be ıitted, by an expenditure which, although considerable, out of reason.

pplication dismissed with costs.

ONBRIDGE, C.J. MARCH 30TH, 1907.

WEEKLY COURT.

RE THOMSON AND STEVENSON.

ation of Actions—Mortgagee in Possession—Acquisition of Title—Vendor and Purchaser.

ption by the vendor under the Vendors and Purchasers r an order declaring that the objection of the purchaser title of the vendor, that the vendor is only a mortgagee session, has been satisfactorily answered by the vendor.

. H. Wardrope, Hamilton, for the vendor.

H. Bicknell, Hamilton, for the purchaser.

LCONBRIDGE, C.J.:—The purchaser is anxious to carry he contract of sale. The mortgagor and persons claim- rough him are barred by virtue of the provisions of R. 1897 ch. 133, sec. 19. The vendor took possession in r, 1892, after the execution of the subsequent mort- and of the conveyance of the equity of redemption, ıe grantees can occupy no higher position than the ıgor. Therefore, sec. 22 of the Act does not help them, e cases cited seem to have no application. The state-

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ment of facts has been amended so as to b
rectly within sec. 19.

Order declaring that a good title has bee

No costs asked for.

MA

DIVISIONAL COURT.

GOULD v. McCRAE.

Master and Servant—Contract of Hiring—I
Presumption—Yearly Hiring—Findings
sal without Notice—Statute of Frauds—

Appeal by plaintiff from judgment of
Elgin dismissing an action for wrongful di
tiff from the service of defendant in the
chinist.

W. E. Middleton, for plaintiff.

W. N. Ferguson, for defendant.

The judgment of the Court (FALCONBR
TON, J., CLUTE, J.), was delivered by

BRITTON, J.:—Plaintiff was hired by def
June, 1906, to work for him in his engine
burg, and plaintiff was dismissed without n
9th October, 1906.

I agree with the County Court Judge th
tract was made between the parties must be
the evidence of plaintiff and defendant. The
"plaintiff had not proved his contract that
for one year by defendant." In view of the f
given in the reasons for judgment, that
plaintiff had not proved an express contra
or an express yearly hiring. No such expr
alleged in this case, and I agree that n
The statement of claim sets up "an agreeme
tiff was to perform the duties of chief mac

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works of defendant at Tilsonburg at the stated salary of per annum, which amount was to be paid to plaintiff ny event, and that defendant also agreed to give to plain- n addition a portion of the profits."

The evidence was of an agreement whereby plaintiff was ork for defendant, and at the stated salary or wages of 5 per day. The evidence established "the relation of loyer and employed" for an indefinite time, and so es- shed a general hiring.

Then the Judge said: "I also am obliged to hold, ac- ing to my view of the law, that as a matter of law a on agreeing to hire for an indefinite time at a certain rate day has not made a yearly hiring . . ." This must nterpreted as a finding of fact by the Judge that there in this case an agreement by defendant to hire plaintiff an indefinite time, the service to be paid for at a certain per day. The evidence of defendant that the hiring was he day was not accepted, but the evidence of plaintiff was pted, and so the time was not either expressly or im- lly limited for the duration of the service.

It is upon the assumption that there has been this finding act that I propose to deal with the case. The Judge, itting the possibility of his ruling upon the law not be- sustained, and upon a yearly hiring if it should be so d, or upon a hiring that would entitle plaintiff to rea- ble notice, if that should be determined, held that the issal was not justified, and he assessed the damages at . There is no cross-appeal.

The evidence warrants the finding that in the hiring there no limitation as to time of service—that there was a ral hiring.

The trial Judge held that as a matter of law such an ement, if proved, could not be a yearly hiring, that such greement negatived any inference, or did not permit of inference, of a yearly hiring. In my opinion, there was in so holding. . . .

Reference to Smith's Master and Servant, 6th ed., p. Beeston v. Collyer, 4 Bing. 309; Lilley v. Elwin, 11 Q. p. 754; Harnwell v. Parry Sound Lumber Co., 24 A. O; Baxter v. Morse, 6 M. & G. 935; Bain v. Anderson, C. R. 484; article by Mr. C. B. Labatt in 34 C. L. J. 8.]

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If I am right in thinking that the Judg
fact of a yearly hiring, if in law he was at
that disposes of this branch of the case.

Even if it can be argued that the trial
found as I have mentioned, he has certainly
contrary. Inferentially he has found that
not by the day or a mere temporary hiring; t
upon which the yearly hiring may be foun
the presumption in favour of such, which h
butted.

It would be a great hardship upon plai
not, at least, in the position of a person entitl
notice of termination of the employment: see
3 O. L. R. 422, 1 O. W. R. 116.

Defendant in his statement of defence p
tion for the dismissal, but failed in the proof
assessed are not more than reasonable dam
notice, the amount being a little less than 3
Plaintiff seems to have done what he could,
ployment, to reduce the damage.

Defendant pleads the Statute of Frauds,
Britain v. Rossiter, 11 Q. B. 123. That was
tract made on 21st April, 1877, for service fo
23rd April, 1877, and so a contract not t
within a year, and within sec. 4 of the statu
sent case the contract—whatever it was—was
with the date when made. Smith v. Gold Co
1 K. B. 538, applies.

In my opinion, the appeal should be allo
judgment in Court below set aside, and ju
for plaintiff for $150 with costs of action.

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THE

TARIO WEEKLY REPORTER

(To and Including April 6th, 1907).

X. TORONTO, APRIL, 11 1907. No. 13

EL, J. April 2nd, 1907.

CHAMBERS.

ROBERTSON AND GRAND TRUNK R. W. CO.

mus—Application to Compel Railway Company to rnish Third-class Carriages and Carry Passengers at a nny a Mile—Statute Incorporating Grand Trunk Rail- y Company—Other Adequate Remedy—Jurisdiction of ard of Railway Commissioners—Refusal of Mandamus.

plication by one Robertson for a prerogative writ of mus directing the Grand Trunk Railway Company to ery day, throughout the length of their line, at least ain having in it third-class carriages, and to compel npany to permit the applicant to travel in such third- arriage on payment of a fare not exceeding one penny h mile travelled, as provided for by sec. 3 of ch. 27 of t., being the Act incorporating the company.

V. Curry, K. C., for applicant.

Nesbitt, K. C., for respondents.

ETZEL, J.:—A prerogative mandamus is preserved in risprudence for the extraordinary cases where without rty would be left without an effectual remedy to com- e performance of some duty in which the applicant is ted, and to the performance of which he has a specific ight. See Holmested's Judicature Act, 3rd ed., p. 77, ses there cited.

o questions must be found in favour of the applicant the writ can issue, according to the practice of the

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Court, which was adopted contemporaneously of the writ as a judicial proceeding, and has followed since, namely: has the applicant right to the performance of some duty by the secondly, will the applicant without the ben be left without effectual remedy.

In reference to the second question, it is s on Mandamus, p. 69: "The writ of mandan grantable of right, but by prerogative, and things it is the absence or want of specific leg gives the Court jurisdiction to dispense it. to give an easier or more expeditious remedy there is no other remedy, being both legal and long and uniformly has the Court adhered and refused to grant, or if granted, quashed where there is a specific legal remedy either or by Act of Parliament, that it has become a law of this subject.....Thus, if a statute ticular remedy, no other remedy can be take in such a case mandamus will not lie."

Unless the section of the incorporating Ac been superseded or repealed by the subseque lation respecting railways, which was suppor ment of counsel for the respondents, I shou according to the practice of the Courts and u ties cited by counsel for the applicant, he has pel the performance by the company of the section above referred to, and would be enti mandamus unless it is clear that he has remedy either at common law or by statute; the consideration of the second question. A clearly of the opinion that under the provisi way Act, 1903, the applicant is furnished adequate remedy for the grievances complai

Section 8 of the Act constitutes the Bo Commissioners a court of record with an off

Section 23 is as follows: "The Board jurisdiction to inquire into, hear, and deter cation by or on behalf of any party interested ing that the company, or any person, has fail matter, or thing required to be done by t special Act, or by any regulation, order, or thereunder, by the Governor in council,

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nister, or any inspecting engineer, or has done or is doing act, matter, or thing contrary to, or in violation of, this , or the special Act, or any such regulation, order, or ection; (b) requesting the Board to make any order, or e any direction, sanction or approval, which by law it is horized to make or give.

"And the Board may order and require any company or son to do forthwith, or within or at any specified time, l in any manner prescribed by the Board, so far as is not onsistent with this Act, any act, matter, or thing which h company or person is or may be required to do under s Act, or the special Act, and may forbid the doing or conuing of any act, matter, or thing which is contrary to this t, or the special Act; and shall have full jurisdiction to r and determine all matters, whether of law or of fact, l shall, as respects the attendance and examination of witsses, the production and inspection of documents, the forcement of its orders, the entry on and inspection of operty, and other matters necessary or proper for the due ercise of its jurisdiction under this Act, or otherwise for rrying this Act into effect, have all such powers, rights, and ivileges as are vested in a Superior Court.

"2. The decision of the Board upon any question of fact, d as to whether any company, municipality, or person is, is not, a party interested within the meaning of this secon, shall be binding and conclusive upon all companies and rsons, and in all Courts."

Section 25 authorizes the Board to make orders and regutions regarding the operation of trains, and inter alia "with spect to any matter, act, or thing which by this or the ecial Act is sanctioned, required to be done, or probited."

Section 44 contains provisions for appeal to the Supreme ourt.

See also sections 214 and 294.

Not only do I think that adequate remedy is provided for e applicant under the provisions of the Railway Act, 1903, ut that such remedy could be more conveniently applied nd executed under the direction and supervision of the Railay Commission than by the Court, and, therefore, in accordnce with the practice I have alluded to, I must refuse the pplication with costs.

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Reference may also be had to Passmore v. C
Urban District Council, [1898] A. C. 387; an
General v. President, etc., of the Shire of Pres
torian L. R. 402, 410.

CARTWRIGHT, MASTER. APRI

CHAMBERS.

PYE v. CITY OF TORONTO AND TWI

*Pleading—Statement of Defence—"Not Guilty b
Motion to Strike out—Public Officer—Medi
tendent of Hospital—Notice of Action—P
Act.*

Motion by plaintiff to strike out statement c
defendant Tweedie as embarrassing.

John MacGregor, for plaintiff.

F. R. MacKelcan, for defendants.

THE MASTER:—The statement of claim allege
tiff's daughter, while in the Isolation Hospital
of Toronto, after recovering from scarlet fever
fit to be discharged, was negligently, carelessly, an
permitted by defendant Tweedie to come in
other children, whereby she contracted measle
Defendant Tweedie is described as a "medical
in the employ of his co-defendants, the corpor
city of Toronto. He pleads not guilty by statu
amongst others to R.S.O. 1897 ch. 88, and the P
Act, R. S. O. 1897 ch. 248, and amendments the
tiff moves to strike this out as embarrassing.

The discussion was as to whether defenda
comes within the protection of R. S. O. 1897 ch.
be entitled to notice of action, which it was a
not been given.

In support of the motion it was argued that
of sec. 1 governed the whole Act, and that it has
tion to a case in which it is not necessary or sensi
that what is complained of "was done malicious

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out reasonable and probable cause." It was contended that the present action is founded on an implied contract, by operation of the provisions of the Public Health Act, that the medical man in charge of any Isolation Hospital shall use all proper care and skill just as fully as if he was attending a patient at home. On the other hand, it was contended that the words of sec. 1, sub-sec. 2, are sufficiently wide to extend to this defendant, who is being sued for something "done in the execution of his office," and that he was certainly fulfilling a public duty, being, as alleged in the statement of claim, medical superintendent of the Isolation Hospital. Reference was made to Township of Logan v. Township of Hurlburt, 23 A. R. 628, Sellars v. Village of Dutton, 7 O. L. R. 646, 3 O. W. R. 664, and to the provisions of the Public Health Act, as shewing that it is incumbent on the city corporation to maintain the hospital, and that those in charge are, while so employed, fulfilling a public duty.

There does not seem any escape from this position. In Parkes v. Baker, 17 P. R. 345, it was held that where (as in the present case) a person who holds a public office is made defendant in an action, the pleadings must be looked at to determine whether he is sued in his capacity of a public officer and so entitled to security for costs, which was the point under consideration in that case. There it was held that the cause of action was not so alleged and that if at the trial the plaintiff sought to make out a case for anything done by defendant as a health officer, he must fail, for it was not covered by the statement of claim, nor had any notice of action been given. See for an application of this principle Lane v. Clinkinbroomer, 3 O. W. R. 613.

Here, however, plaintiff alleges that his daughter was under the care and control of defendant Tweedie as medical superintendent of the Isolation Hospital, and in no other way, and that it was through the negligence and breach of duty of the defendants in allowing his daughter to come in contact with persons suffering from measles, contrary to the rules of the Hospital and the medical profession, that his daughter died.

Under these facts it seems impossible to hold that defendant Tweedie was not fulfilling a public duty, or that the action as against him is not for something done in the execution of his office, and the motion must be dismissed with costs to defendant in this cause.

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CHAMBERS.

VANDUSEN v. ROBERTSON

Pleading—Statement of Claim—Motion to S barrassment—Prayer for Relief—Maliciou Conspiracy—Amendment.

Motion by defendants to strike out the sta in whole or in part, or at least to compel an

W. N. Ferguson, for defendants.

T. J. W. O'Connor, for plaintiff.

THE MASTER:—The allegations in paragr the statement of claim may be summarized as plaintiff is the proprietor of an employment ag defendant Robertson, the owner and publishe ing Telegram," wished to kill as being injurio For this object he conspired with two of his re to plaintiff for situations and pay the neces They thereupon laid a charge against plaint money under false pretences, This charge and plaintiff was honourably acquitted by th trate.

Then follows (paragraph 10) a charge of secution. The reports given in the "Telegra ceedings before the magistrate on 29th and and 7th December, 1906, are also set out in p and 9, as shewing the malicious intent of Robertson. The prayer for relief is somewh is as follows: "For the reasons hereinbefore a plaintiff claims from the said defendant ($5,000 "—then (2) costs and (3) further reli

On the argument it was pointed out that really embarrassed because from the prayer $5,000 as damages, it does not appear what plaintiff is relying on. It was said that he be suing for libel in the publication of the fore the magistrate. This, however, is not fo

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as plaintiff served a jury notice with the statement of , it would appear that this was not in contemplation. am right in this view, an undertaking can be given in rder to this effect.

his would leave two possible grounds of action: (1) iracy to injure plaintiff's business as evidenced in part e publications set out in the statement of claim; and alicious prosecution. It might be thought that plaintiff succeed in one of three ways. He may either rely on onspiracy and give the prosecution as evidence of e, or he may rely on the malicious prosecution and give her facts in evidence as establishing malice, or he may ne the two in this one action and claim damages on count. No doubt, the plaintiff is not to be unneces- limited in his pleading, nor is there any reason for ing separate trials of these issues if he thinks it for terest to combine them in the same action.

n the other hand, defendants are entitled to know precisely is the case they have to meet. It was said by C.J.O., in Dryden v. Smith, 17 P. R. at p. 512, in l to pleadings of an adversary, that the other party "is ed to have them set forth in such manner as will enable upon reading them to form a fairly correct judgment their scope and meaning, and as to what is intended to ied upon under them."

efendants are entitled to have the statement of claim to conform to the principle enunciated above. This can be done by amending the prayer for relief so as to shew hat he is claiming and if for separate causes of action g so plainly.

n order will therefore go directing plaintiff to amend as ay be advised within a week. Defendants to have 8 days service of the amended statement of claim to plead o. The costs of this motion will be to defendants in vent, as defendants were really and seriously embar- l.

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MACBETH, Co.C.J. MARC
FALCONBRIDGE, C.J. AP

CHAMBERS.

REX EX REL. ARMSTRONG v. GAI

Municipal Elections—Statutory Declaration o to be Filed by Candidate after Nominatio Made and Subscribed 6 Weeks before Nomi cipal Act, sec. 129 (3)—Construction—Ol after Election—Irregularity—Result not tion to Set aside Election—Costs.

Motion under the Municipal Act to set asi of the defendant as an alderman of the city of

MACBETH, Co. C.J.:—The defendant was a this city for the year 1906. He went to Englar November last. He intended to be a candida tion at the then ensuing municipal elections, November last he made and subscribed a stat tion, which in point of form is conceded to b comply with sec. 129 (3) of the Municipal Ac fendant did not propose to return to Canada elections, he left this declaration in the hands to be filed on his behalf. At the nomination m 31st December last the defendant was duly the office of alderman; before 12 o'clock noon ary the declaration so made by him was filed clerk, who placed the defendant's name on the and at the poll on 7th January he was elected

On 1st March a motion was made before the defendant, on the sole ground that he had with sec. 129 (3), the relator contending that tion the declaration must be made, subscribed, well as filed, after the nomination and within th allowed for the filing, and that a declaration before the day of nomination should not have by the city clerk, and the latter therefore had to place the defendant's name on the ballot quently his name should not have been on the and he was not and could not be properly elec

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It is important, it seems to me, to note the provisions of ıe Municipal Act as to the other declaration to be made ſter election by every person elected. By sec. 311, "Every ɪrson . . . elected . . . shall . . . before he ıters upon his duties, make and susbcribe a solemn declaraon . . . " By secs. 315 and 316, the declaration is ɔ be made before one of the persons therein mentioned, and ıch person (sec. 317) is to deposit the same within 8 days ı the office of the clerk of the municipality, and sec. 319 nposes a penalty for the omission to make this declaration ithin the time therein specified. Here then we find the me of making and the time of filing this declaration preisely defined.

Turning now to sec. 129 (3), which calls for a declaraon to be filed by the candidate within (at the most) 48 ours after the hour of nomination, we find no precise enactıent as to the time when this declaration is to be "made nd subscribed," but merely as to the time when it is to be led. Within that time the candidate is to file a declaration ıat he possesses the necessary qualification for the office. 'he relator takes this to mean that the declaration must be ıade and subscribed as well as filed after and within (in the resent case) 48 hours after nomination, i.e., that the candiıte must declare to his possession of the necessary qualifiıtion after he has been nominated. I am not disposed to ad this section so strictly, nor am I satisfied with the lator's reading of it. I am disposed to think that if a ɔuld-be candidate made a declaration, say, on the day bere nomination, declaring his possession of qualification, and ·d such declaration on his nomination, he would have erally complied with the requirements of this section. is section 129 (3) was first enacted in 1900, as an amendnt of what had been the law for many years. It requires andidate to do what was not required of him before, and refore should be read strictly: Re Ingersoll, 16 O. R. 194. ile full effect should be given to its provisions, I would not d into it anything not plainly to be found there. If the ıtor's contention be correct, viz., that the candidate must scribe as well as file his declaration after the nomination within at the most 48 hours thereafter, then no candie for office in any urban municipality in Ontario could his name on the ballot papers, and go to the polls, if at hour of nomination he happened to be at a distance of two ' journey from the municipality. I don't think I should

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hold that the legislature enacted or intended
to bring about this result unless the language
ment were plain and positive to that effect.

The objects of sec. 129 (3) seem to be:—

1. To require the candidate to accept the
mally. Previously, a person nominated, ev
knowledge or consent, would find his name
papers unless he had sent in his resignation
later than the day after the nomination.
sumed to have resigned unless he formally a
his declaration.

2. To prevent persons who know themse
qualified from posing as candidates and getti
on the ballot papers. I do not think that
object should be defeated by allowing the dul
didate to subscribe and make his decaratio
before nomination day. There would not se
risk in accepting such declaration as sufficie
poses of the section in reliance upon the
continuity: Wigmore, Can. ed., p. 382; Phips
3rd ed., p. 86. And if the legislature tho
to provide against the unlikely contingency
didate losing his qualification between the
clarátion and the time of filing it, then
been plainly enacted that the making as we
should be after the nomination, at least as
time of making and filing is prescribed in
declaration to be made after the election.

But, even if the declaration under sec.
made before the day of nomination, the rel
that in the present case it was made 6 wee
that on any reading of this section it could
that so much time should elapse between t
the filing. If 6 weeks, why not 6 months?
hand, it is urged for the defence that the
could be whether the lapse of time was re
the circumstances, assuming the candidate
good faith, and that in the present case the
his declaration at the latest date possible for

In this connection it may be well to cons
of the city clerk under sec. 129 (3), as to
some difficulty. It seems to be clear that h
this section ought to be held as far as possil

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ial rather than judicial—certainly it should not be for
n to decide such questions as that now before me.

If the declaration tendered on behalf of a candidate be
de after the final revision of the assessment roll upon
ich the candidate must be qualified, if it avers the pos-
sion of the necessary qualification, specifying the prop-
y, and if such averment be corroborated by the last re-
ed assessment roll, I think the city clerk should file the
laration and place the candidate's name on the ballot
per. If the declaration in question may be made and sub-
ibed before the day of nomination, I do not think it is for
city clerk to say how many days or weeks before it
y or may not be made, if, at least, it be made after the
l revision of the assessment. And if the city clerk has
doubt, he should certainly decide in favour of the can-
ate. And, under the circumstances of this case, I can-
say that the city clerk did wrong in placing the defend-
's name on the ballot papers. I may add that I am by no
ans sure that his action in this respect is open to ques-
n in these proceedings.

If I am wrong in holding that the declaration in ques-
n may be made before the day of nomination, if it was
ective or invalid, as being made prematurely, and, on
t account might or should have been rejected by the
clerk, yet it seems that I am bound to decide that this
ction cannot be taken after the election.

Section 204 of the Municipal Act says: "No election shall
declared invalid . . . by reason of any irregularity,
t appears that the election was conducted in accordance
n the principles laid down in this Act, and that such
gularity did not affect the result of the election." Many
es shew that this section is to receive a liberal construc-
n. See the remark of Meredith, C.J., in Rex ex rel.
rr v. Walsh, 5 O. L. R. 268, 2 O. W. R. 129. Two very
nt cases seem to be much in point.

In Rex ex rel. Martin v. Watson, 7 O. W. R. 282, 11 O.
R. 336, the declaration filed by defendant before elec-
was untrue in fact; the defendant was not in fact quali-
upon the property specified in his declaration; but the
nicipal clerk placed the defendant's name on the ballot
ers, and he was elected. He had other property suffi-
t to qualify him. A motion made to unseat him, on the
und that his interest in the property specified in his de-
ation was insufficient to qualify him, was dismissed by

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the County Court Judge, and on appeal
"The first declaration being on its face
and having in view its limited purpose, an
in fact duly qualified for the election
elected, I think it is too late after the e
that the misstatement regarding the q
mentioned in the first declaration is a g
aside the election, which is otherwise fre

In Rex ex rel. Cavers v. Kelly, 7 O. W
declarations of the successful candidates
were made before a commissioner in H. C.
one of the persons named in sec. 315. The
that such declarations were mere nullitie
Chambers said: "Section 204 is to be libe
Had the present motion come before Me
is little doubt how it would have been d
been necessary to invoke this section. Ev
tions of qualification were open to all th
by the relator, I do not see how it can be
did not affect the result of the electio
was merely obiter, as the Master held th
objectionable, but his experience in these
weight to his opinions.

Therefore, even if defendant's decla
prematurely, still, as it was made by him
a compliance with 129 (3), and acted u
by the city clerk, I must now hold that
worst merely an irregularity which has n
sult of the election.

The relator's application fails, in my

The point is a new one, and it may be
tent that the defendant brought this att
by the somewhat unusual course he saw
think I am warranted in dismissing th
costs.

The relator appealed to a Judge in C

George S. Gibbons, London, for relato

E. E. A. DuVernet, for defendant.

FALCONBRIDGE, C.J.:—I have felt s
disposing of this case by reason of the
produced on my mind by the well consi
ious argument of Mr. George S. Gibbon

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But I have come to the conclusion that the learned
ge has taken the correct view of the points involved, and
his judgment ought to be affirmed, for the reasons
forth therein, to which I can add nothing.

The course taken by the defendant in making the de-
ation in advance is to be deprecated, and not to be en-
aged so as to grow into a precedent, and I therefore
iss the appeal without costs.

APRIL 3RD, 1907.

DIVISIONAL COURT.

RAY v. KILGOUR.

*ssment and Taxes—Tax Sale—Right of Owners to Re-
leem—Extension of Time for—Special Act, 2 Edw. VII.
h. 49—Construction—Payment to Town Treasurer by
Tenant in Common—Agreement to Take back Money—
Pleading—Amendment—Costs—Title to Land.*

ppeal by plaintiffs from judgment of MABEE, J., at the
at Port Arthur, in so far only as it dismissed the action
st the defendants the Ruttans. The action was to set
a tax sale and for redemption.

. A. Moss, for plaintiffs.

. Cassels, K.C., and R. S. Cassels, for defendants the
ns.

e judgment of the Court (MEREDITH, C.J., MAC-
N, J., MAGEE, J.), was delivered by

EREDITH, C.J.:—Plaintiffs allege that plaintiff Cameron
registered owner of the lands in question, having the
itle vested in him as trustee for plaintiff Ray.

e lands in question are the undivided one-half of lot
ncession K. of the township of Neebing . . . now
town of Fort William.

eph Kilgour, one of the defendants in the action, was
ner of the other undivided one-half of the lot.

24th January, 1902, the mayor and treasurer of the
f Fort William, in pursuance of a sale for taxes, con-
o James F. Ruttan the whole of lot 2.

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The tax sale took place on 24th Octob
the authority of a warrant under the hand
and the seal of the corporation of the tow
liam, bearing date the previous 12th July.

On 17th March, 1902, upon the applicati
cil of the town of Fort William, an Act was
VII. ch. 49, secs. 1, 2, and 3 of which are as

"1. All assessment rolls of said town h
revised, all collectors' rolls of the said t
returned by the collectors thereof, and al
turns heretofore made, are hereby validated
notwithstanding any irregularity, fault, or
said assessments, collectors' rolls, or coll
or in any matter or thing done or omitted
relation thereto, and notwithstanding anythi
any Act or Acts to the contrary.

"2.—(1) All sales of land within the said
fore the 1st day of November, 1900, and p
made for arrears of taxes in respect of th
are hereby validated and confirmed, notwi
irregularity in the assessments, or any oth
for imposition of any taxes so in arrear, or
comply with the requirements of the Conso
ment Act, 1892, or of the Assessment Act,
or Acts amending the same, in regard to th
signing of the same, or the making of any
required in connection therewith, or in reg
for the return of any collector's roll of the
regard to the furnishing, authenticating, o
any list of lands in arrear for taxes within
or in regard to the mailing of notice to an
spect to whose land any taxes appeared at a
arrear, or in regard to any omission to le
of any such taxes in arrear by distress and
and notwithstanding any other failure, omis
of any kind whatsoever in or about the said
of any official of the said town, and notwi
thing to the contrary in any of the said A

"(2) The owner of any land sold at the
held in the year 1900, or his executors, ad
assigns, may, at any time within 12 months
ing of this Act, redeem the land sold by payi
to the town treasurer, for the use and ben

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r or his legal representative, the sum paid by him, her with 10 per centum thereon; or, in the event of the s so sold having been purchased by the town, by paying endering to the said treasurer the full amount of the due, together with the expenses of sale, and the trea- shall give to the person paying such redemption money eipt stating the sum paid and the object of payment, such receipt shall be evidence of the redemption.

(3) Any lands within the said town which at any sale arrears of taxes heretofore have been or hereafter may ought in by or for the said town shall be liable to be sed for and charged with payment of all debenture, improvement, school, and general rates within the said in the same manner and to the same extent in every ect as if the said lands did not belong to a municipal oration.

3. The provisions of section 1 and section 2 of this shall not affect any action, matter, or other proceeding pending, but every such action, matter, or other pro- ing shall be proceeded with and heard and determined the said sections had not been passed."

On 13th March, 1903, Kilgour, through his solicitor, Mr. gworthy, paid to the treasurer of the town, for the and benefit of the tax purchaser, the sum paid by the er, with 10 per cent. thereon.

On 30th April, 1903, the town treasurer forwarded to tan the town's cheque for $31.86, accompanied by a er stating that this was "the amount paid in by Mr. gworthy to redeem lot 2, concession K., from sale of under the provisions of the Fort William Act, 1902."

On 4th May, 1903, this cheque was returned by Ruttan he treasurer, accompanied by a letter in which the writer ted out that the right to redeem was given by the Act the owner only, that Kilgour had no interest in the lot, had therefore no right to redeem, and the writer also ed that the Hammond estate appeared to own the inter- which Kilgour once had in the lot.

Ruttan having taken this position, an action was begun Kilgour against Ruttan and Robert A. Ruttan for a de- ration that Kilgour was entitled to an undivided one-half erest in the lot in question, and an order to remove from files of the registry office of the district of Thunder y a deed dated 10th February, 1899, purporting to be

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made by Charles C. Abbott of the one part
the other part, and the tax deed to James F.

The litigation resulted in a compromise
gour and F. S. Wiley, to whom he had sold
interest, obtained an undivided one-half of
paying, as I understand the testimony, $48.8
the taxes which Ruttan had paid, including
which the lot was sold.

Plaintiff Ray made an unsuccessful effor
in that action and to be added as a party to
and Kilgour and Wiley making common cau
his application to be made a party.

My brother Mabee came to the conclusi
had been no redemption of the lot under the
the Act of 1902, being apparently of opinion
tiffs were not parties to the payment which w
town treasurer, it was competent for Kilgour
with the consent of Ruttan, to take back the
he had paid, and that, having agreed to do so,
the same as if the payment had not been m
was therefore no redemption within the m
Act.

I am, with respect, unable to agree with
of my brother Mabee.

Assuming that one of two or more tenants
land which had been sold for taxes at the sa
entitled to avail himself of the provisions o
sec. 2, and to redeem, and that Kilgour owne
interest in the lot in question, I am of opinio
as Kilgour had paid to the town treasurer f
benefit of the tax purchaser the sum requi
the lot, the redemption was complete, and
ceased to be of any force or effect, not only a
est of Kilgour, but also as to the estate of
who had any interest in the lot.

The effect of the sub-section, in my opini
store the original right of the land owner to
had come to an end at the expiry of a year
of the tax sale, and to extend the time for r
12 months from the passing of the Act, and,
effect of the Act, the right of the tax purc
an end to when the money required to redee
any person entitled to pay it.

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That Kilgour had an interest in the lot entitling him to
edeem it, unless, as defendants the Ruttans' counsel now
ontend, one of several owners is not entitled to redeem,
not now questioned, and, so far as this branch of the
ase is concerned, the only question remaining to be consid-
ered is whether that contention is well founded.

I am of opinion that it is not. It is highly improbable
hat the legislature intended that there should be no right
o redeem unless every one having an interest in the land
hich had been sold should join in redeeming it. The re-
ult of requiring that would be to deny the right to redeem
ltogether where the land sold was owned by several ten-
nts in common, unless all of them joined in redeeming.
. . .

Looking at the results of an opposite construction, and
aving regard to the fact that what was done was to extend
he time originally allowed for redemption, I am of opinion
hat a part owner, such as Kilgour was, comes within the
rovisions of sub-sec. 2, and that he was entitled to exercise
he right to redeem conferred by those provisions. He
as a person who undoubtedly had the right to redeem
ithin the original period allowed for redemption, and it
ould require clear and unequivocal language to justify a
onstruction being given to the sub-section which would
eny to him the same right during the extended period
lowed for redemption.

I would, therefore, allow the appeal with costs, and dir-
t that for the judgment which my brother Mabee directed
be entered, except in so far as it directed the dismissal
the action as against defendant Kilgour with costs, there
ould be substituted a judgment declaring that the right
redeem conferred by sub-sec. 2 of sec. 2 of the Act of
02, has been well exercised and the land redeemed, and
recting defendants the Ruttans to reconvey the undivided
e-half of the lot in question to plaintiffs or to whom they
y appoint.

There should be no costs of the action to either party.
though at the trial plaintiffs went into the case upon
ich I am of opinion they were entitled to succeed, no
h case was made in their pleadings, which were confined
attacking the tax sale on various grounds . . . No-
ere in the pleadings, so far as I can discover, is relief

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claimed upon the ground of the redemption of t
the provisions of the Act of 1902. As the ca
fought out on the latter question, it would no
I think, to dismiss this action without prejudic
action being brought, but justice will be done
plaintiffs to pay their own costs of this actio
should have leave to amend nunc pro tunc by se
facts upon which they have relied and have suc

What I have written is based on the assu
plaintiffs made out at the trial a title to the un
half of the lot which they claim. . . . If
the Ruttans desire it, the case may be spoken
point, and, if necessary, directions can be gi
taking of further evidence.

MABEE, J. APRI

TRIAL.

PENSE v. NORTHERN LIFE ASSURAN

*Life Insurance—Action on Policies—Question u
cies in Force at Death of Insured—Construc
cies—Payment of Premiums—"Annually"
Year.*

Action to recover from defendants $2,000, th
two insurance policies issued by them upon
George Ziegler jr., and assigned to plaintiff.

J. L. Whiting, K.C., for plaintiff.

T. H. Purdom, K.C., for defendants.

MABEE, J.:—The first policy for $1,000 is
May, 1901, and is called a "guaranteed cash su
loan policy;" the premium was $31.20, payable
on 30th May in each year for 20 years; the pol
able to Hannah Ziegler, the wife of the assur
miums were paid down to and including that o
1905. None was paid on 20th May, 1906, or
thereafter. On 9th June, 1906, Ziegler and
signed the policy and all their interest therein
Ziegler died on 8th November, 1906. Plaintiff

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at the time of death the policy was still on foot, and defendants contend that it lapsed by reason of non-payment of the premium due on 20th May, 1906.

The following provisions appear upon the face of the policy:—

"1. That if, after the payment of three full years' premiums, this policy shall lapse for the non-payment of any premiums, . . . the company will, upon application, the payment of all indebtedness hereon, and the surrender of this policy and the last renewal receipt, within 3 months after such lapse, issue a non-participating paid up policy, with the same provisions as this policy, for as many twentieth parts of its principal amounts as complete annual premiums shall have been paid in cash hereon, or apply the same towards the purchase of extended insurance in accordance with the schedule indorsed hereon.

"2. That if, after the payment of 5 full years' premiums, this policy shall lapse for any of the reasons aforesaid, the company will, upon application, the payment of the indebtedness hereon, and the surrender of the policy and the last renewal premium receipt, within 3 months after such lapse, pay to the holder of this policy the cash surrender value shewn in the schedule indorsed hereon, or, at the option of the holder of this policy, the said company will lend to him any sum not exceeding the sum shewn in the schedule for one year, interest to be paid thereon at the rate of 6 per cent. per annum, the premium for the ensuing year and the said interest being first deducted."

The schedule referred to in these provisions shews that a policy in force for 3 years would entitle the holder to have a paid-up policy for $150, or to have the existing policy extended for one year, and at the end of that period taking a paid-up policy for $47. The schedule shews that a policy in force for 5 years would entitle the holder to one of the following benefits: (1) taking $66 in cash; (2) loan of $85; (3) paid-up policy for $250; (4) having the existing policy extended for 2 years and at the end of that period taking a paid-up policy for $84.

Clause V. of the printed conditions indorsed provides that one calendar month will be allowed for payment of renewal premiums of policies in this class after the same are payable, at the expiration of which time, if the premium remains unpaid, "this policy shall thereupon cease to be in force."

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The insured on 21st May, 1906, was in c
his contract he had engaged to pay $31.20
he had a month to make this payment. This
so ordinarily his policy would then "cease to
under clause V., but this policy clearly did no
in force" on 20th June, 1906, because the
under clauses 1 and 2, upon the face of h
months from either 20th May or 20th June
latter, within which to elect which of the ben
for by these clauses he preferred. Defenda
that the insured was compelled to make appl
these clauses had any effect; yet, had he, for
plied to the company in July, he would clea
entitled to have had his policy extended for th
for 2 years from 20th May, and at the expirat
to a paid-up policy for $84; so it seems evi
mere omission to pay the premium on 20th M
not without more put an end to this contract.

It is difficult to read clause 2 harmonio
schedule, but it was not contended that the in
more limited rights under the 2nd clause, aft
5 years' premiums, than he had under the 1s
payment of 3 years' premiums.

Then what position was the insured left
expiration of the 3 months? Defendants con
cash value of the policy according to the sched
be applied towards the purchase of extended in
the insured making an application to that e
I do not think clause 1 necessarily bears that
The insured, if he wants a non-participating p
must make application, pay all indebtedness,
policy and the last renewal receipt, within thr
the insured does not do this, then the compa
the same towards the purchase of extended
accordance with the schedule. If the insur
take the non-participating form of policy, he
surrender the one he then had, and give up th
but, if the cash value were being applied, firstl
of two premiums in advance, the existing pol
be given up. As I read this clause, the compan
to apply the moneys in hand to the credit o
namely, the $66 as shewn in the schedule, tow
chase of extended insurance, and they cannot

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f the policy; that, in fact, there was no lapse, and it was n full force on 8th November, 1906.

The second policy, for $1,000, is dated 31st March, 1903, nd is called a "duplex policy." Part of it is as follows: 'In consideration of the application, etc., etc., and of the um of $17.95, being the premium for one year's term in- urance, to be paid in advance to the company at its head ffice, etc., on the delivery of this policy, and the further um of $33.90 payable annually for an additional term of 9 years, the first of such additional payments to be made n the 20th day of March, A.D. 1904, insured the life of eorge Ziegler jr.," etc., etc. The policy was assigned to laintiff on 9th June, 1906. The premium said to be pay- ble on 20th March, 1906, has never been paid.

The only question involved as to this policy is, whether, nder the foregoing provision, the premium was payable in dvance, or whether the insured had the whole interval be- ween 20th March or 31st March, 1906, and 19th March or 0th March, 1907, to pay it. If the premium for the fourth ear was payable in advance on 20th March, 1906, it is not isputed that the policy was not in force at the time of ne death.

The "term insurance," as it is called in the policy, is xpressly stated to be payable in advance. The payment of ne $17.95 carried the insured for one year from 31st arch, 1903, so the first of the annual payments for the additional term of nineteen years," being payable on 20th arch, was some 11 days before the "term insurance" xpired; the second year commenced on 31st March, and ot on 20th March, and the payment of the $33.90 on 20th arch, 1904, as the contract calls for, would carry the pol- y to 31st March, 1905. What is there in the contract at calls for the subsequent payments being made not only advance, but 11 days before the expiration of the year? he "term insurance" and the first year of the "addi- onal term" are clearly provided for; the subsequent pay- ents are to be made annually. Does this necessarily mean advance on 20th March in each succeeding year? Why on th March and not on 31st March? Defendants plead that is premium "fell due on the 20th day of July, 1906, and nained unpaid; the time for payment thereof was extend- for one month, and the same became due on the 20th day

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of August, 1906, and the same remained unpai
know why it is alleged in the pleading that t
was payable on 20th July. It was argued at t
it was payable in advance on 20th March, 190
ence was given upon behalf of either plaintif
ants, and the case was argued merely upon t
tion of the policies and the admission of plain
that the premium for 1906 had not been paid

It seems to me that the mode of paying the
this policy is extremely confusing, and it is di
when the second year's premium for the "addi
was really payable. Defendants had the fra
contract entirely under their own control, and
declaration of forfeiture of their policy, beca
struction placed upon the contract by themselv
same that plaintiff contends for. The policy
fendants against premiums being in arrear,
contract is to pay the $1,000, "first deductin
the balance of the current year's premium, if

An indorsement upon the policy provides t
any premium . . . be not paid when due
policy shall be void." A clause providing f
must be read strictly. The argument was that
ment of the $33.90 on 20th March, 1906, w
feiture, and under the above clause the policy w
This, I think, clearly is not so, because at t
insured had his premium paid for carrying his
31st March, and had the death occurred b
and 31st March, 1906, I do not think defe
have been heard to say that the policy had
notwithstanding that they had taken the
manded for an insurance up to 31st March.
policy forfeited for non-payment of the pren
March, 1906? It is not so pleaded, it was n
nor does the policy provide for a forfeiture
ment of the premium upon that day. Then
forfeiture occur, or why must it be said in
company that put out a contract of this so
ever was any forfeiture of it?

The Century Dictionary gives as the mea
nually"—yearly—each year—returning ever
by year. The contract then in effect is to pa

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$17.95 for an insurance from 31st March, 1903, for one year's term insurance, then to pay annually or yearly, each year, year by year, for an additional term of 19 years, the first of which is to be paid on 20th March, 1904. In arriving at the conclusion that the first year of the "additional term" did not commence until 31st March, I am not overlooking the fact that the distribution period referred to in the indorsement on the policy is stated to be 20th March, 1923, but this cannot have the effect of cutting down the first year from 31st March to 20th March; in other words, having accepted the premium for a year's term insurance from 31st March, it is not open to defendants to cut that year down by 11 days. Clause 5 on the face of the policy states that "the dividend distribution period is 20 years,"—20 years from when? According to the indorsement on the policy, from 20th March, 1903, but that is 11 days before the policy was issued, so I am driven to say that, while the dates are fixed when the first and second premiums are payable, it is impossible to hold that the subsequent premiums are necessarily payable on 20th March in each year. Then what is to be done when the policy is not clear and explicit, but is so framed as to lead to doubt and contention; in whose favour is the contract to be construed?

McMaster v. New York Life Insurance Co., 78 Fed. Rep. 33, is authority for the two propositions: that ambiguous provisions in a policy of life insurance must be construed most favourably to the insured; and so as to avoid a forfeiture when it may be fairly done. Apart from these considerations, insurance contracts, like other instruments, should be construed agreeably to the intention of the parties; where doubts arise as to the proper construction to be placed upon the insurance contract, the insured is entitled to have them resolved in his favour: Am. & Eng. Encyc. of Law, 2nd ed., p. 863, vol. 16.

I think it would be unfair to declare this policy forfeited under the construction of this contract contended for by defendants.

Plaintiff may have judgment for $2,000, less the current year's premium on the second policy, with interest from date of writ and costs.

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RIDDELL, J. APRIL 5TH, 190

CHAMBERS.

RE HUGHES, MAHAFFY v. NICHOLSON.

Pleading—Statement of Defence—Motion to Strike out Par —Action to Establish Will—Setting up Prior Will.

Appeal by defendants from order of Master in Chambers ante 506, striking out part of the statement of defence.

W. E. Middleton, for defendants.

Grayson Smith, for plaintiff.

RIDDELL, J., allowed the appeal and restored the part o the pleading struck out, with costs here and below to de fendants in any event.

RIDDELL, J. APRIL 5TH, 190

WEEKLY COURT.

RE ARCHER.

Will—Construction—Devise—Vested Estate—Divesting o Death of Infant Devisee — Gift over to Presbyteri Church in Canada — Testator Dying within Six Mont after Execution of Will in 1885—Statutes of Mortmain Act Incorporating Board of Trustees — Application Statutes—Lapsed Devise — Absence of Residuary Clau —Intestacy.

Motion under Rule 938 for a summary order determini questions arising upon the will of William Archer, deceas

T. D. Delamere, K.C., for Jane McArthur.

H. Cassels, K.C., for the Presbyterian Church in Cana

W. Cook, for heirs at law of William Archer.

D. Macdonald, for the executors of William Archer.

F. C. L. Jones, for the executors of Charles McArthur

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RIDDELL, J.:—William Archer made his will 17th Decem- 1885, and died 25th December, 1885, the will being ad- ed to probate 21st January, 1886. The provisions of will of importance to be considered here are as follws:— give and bequeath to my beloved wife Ann . . . all rents and profits arising or accruing from real or per- l estate . . . belonging to me . . . during her ime, and at her decease my will is that the said rents profits of my real estate . . . shall go to Jane Mc- ur . . . during her lifetime, and at her decease I and devise my real estate consisting of the north-west ter of lot number 12 in the 9th concession of . . . ghan to her son William Archer McArthur, his heirs and ns . . . but if the said William Archer McArthur ld die without issue before his mother Jane McArthur, is to have the one half of the said real estate to dispose s she may think fit, and the other half is to go to the byterian Church in Canada."

There is no residuary clause.

The widow Ann died 26th March, 1886, and William er McArthur died 3rd November, 1889, under the age years.

The question to be determined is: who is entitled to the ?

Counsel for Jane McArthur argues that an interest in land became vested in the infant at least upon the death he widow; that the gift to the Presbyterian Church is by the Statutes of Mortmain; that the divesting can take e and could be intended to take place only if and when gift over can take effect; and that, consequently, while the e of the infant is as to one moiety divested and so vested is client, the other moiety is not divested, and therefore ngs to the estate of the infant.

Counsel for the Presbyterian Church contends that the le estate of the infant is divested, and that, while at the of the death of the testator the Church could not have n, subsequent legislation has cured that difficulty.

Counsel for the next of kin of the testator argues that estate of the infant is wholly divested; that as to one ty there is a lapse; and, there being no residuary devise, there is an intestacy as to that moiety.

I am of opinion that this last contention is entitled to ail.

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Admittedly Jane McArthur had upon the death of th widow an estate for life, and there was also an estate in he son. This estate of the son, vested as it was, was liable t be divested upon his death in the lifetime of his mother. I is not disputed that the one moiety has been divested. In deed, none of these propositions can be successfully dispute in view of the authorities.

Whether there can ever be a case in which one moiety o an estate so vested may be divested while the other moiet remains vested, I need not determine. See Gatenby v. Mo gan, 1 Q. B. D. 685. The moiety in dispute cannot in an case be less liable to divestment than if it were the sole de vise over; and it has been settled that a provision for divest ing is not rendered of no avail by the fact that the gift ove is void by the Statutes of Mortmain, though that gift be fo all other purposes void: Robinson v. Wood, 6 W. R. 728. 2 L. J. Ch. 726.

The leading case is Doe v. Eyre, 5 C. B. 713. In th there was an appointment to A., his heirs and assigns, but i case of the happening of an event (which did actually happen then to B. B. was a person incapable of taking—it wa held nevertheless . . . that the estate was diveste Parke, B., giving the judgment of the Court, p. 746, says "If a testator were to devise to A. B. in fee, and to dire that in the event of A. B. dying in the lifetime of J. S., t estate should go over to a charity, it surely is perfectly cle that if A. B. died in the lifetime of J. S., he, A. B., rather his heirs, would lose the estate. . . . The esta of A. B. is in such case defeated, not by the giving over the estate to the charity, but by the happening of the eve on which the testator intended it should go over." And adds: "How she (i.e., the settlor) would have disposed it if she had known that she could not give it in the mo proposed by her will, can only be a matter of conjectu One thing quite certain is that she has not expressed any tention that in the events which have happened John (should take; and, as he can only be entitled by virtue of expressed intention in his favour, we think that he fails establish any right."

This last remark is applicable to the case under c sideration.

In O'Mahoney v. Burdett, L. R. 7 H. L. 388, there wa gift of £1,000 consols to A. for life, after her death to daughter B., "if B. should die unmarried or without child

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c consols I here will to revert to C.," and D. was appointed siduary legatee. A. and C. died in the lifetime of the statrix. B. entered into possession and died without child-n. It was held that the death of C. in the lifetime of the statrix had no effect upon the divestment of the gift to B. on her dying, and that, there being a lapse, the residuary gatee became entitled.

In Hurst v. Hurst, 21 Ch. D. 278, certain property was ven to trustees upon trust to permit H. to receive the rents r his lifetime and after his death to convey to his children, ith a proviso that if he charged or incumbered the pro-erty the gift to him should be absolutely forfeited and the ift to the children at once take effect. He did incumber the tate, and it was held by Fry, J., and the Court of Appeal, at this had the effect of forfeiting the life estate of H., lthough H. had no children, so that there were no persons take under the gift over. See also Donohoe v. Mooney, 27 . R. Ir. 26.

The rule is different where it can be inferred that the in-ention of the testator is that the divesting shall not take lace unless the gift over can be effective, as in Crozier v. rozier, L. R. 15 Eq. 282, and Monck v. Crozier, [1900] 1 r. 56, wrongly cited in Theobald, 5th ed., at p. 570, as in 1899] 1 Ir. The rule also seems to be different where the ame of the proposed beneficiary is not inserted in the will: er Lord Selborne in O'Mahoney v. Burdett, L. R. 7 H. L. p. 407.

The decision in Robinson v. Wood is directly in point; it ems to be in accord with previous authority, and not to ve been questioned. I therefore follow it.

The next question is: "Is the gift to the Presbyterian urch void under the statute?"

I may disregard R. S. O. 1897 ch. 112, 55 Vict. ch. 20, ich applies to wills of persons dying on or after 14th ril, 1892, only. The decision in Re Barrett, 10 O. L. R. 7. 5 O. W. R. 790, cannot assist the Church.

The Acts I must consider are R. S. O. 1897 ch. 333, sec. 7; & 23 Car. II. ch. 10; R. S. O. 1877 ch. 216; and 63 ct. ch. 135 (O.) It is admitted that, unless the last-named t assists the Church, the gift is void; but it is argued that gift to the Church not having yet come into possession, must be governed by the law now in force, and that the is, in virtue of this Act, such as to make the gift effec-e. I do not think either contention is well founded. The

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gift, if effective, vested in the Church not later than th death of the infant—and that admittedly was before th passing of the recent Act. The rights of the Church must b determined at least that early—and the law then was fat to the Church's claim.

Moreover, the Act, when it provides that "all gifts, de vises, etc. . . . which have been or shall hereafter b made to or intended for the Presbyterian Church in Canad . . . shall vest in the said board of trustees," must refe to valid and effective gifts, devises, etc., not to such as ar void by the statutes or otherwise. The vesting is only to b as effective as if made direct to the board. It never wa intended to change the general law of the land by an enact ment passed for the purpose of incorporating a board o trustees for the Church, and enabling such board to transac the business of the Church.

The next question is, what is to become of the moiet which was intended for the Church? If my conclusions ar sound, there has been an attempt to dispose of certain pro perty which has failed. If there were a residuary devis this would fall into the residue. As there is no residuar devise, there is an intestacy. This moiety then will belon to the estate of the testator, to be dealt with as though n mentioned in the will: O'Mahoney v. Burdett, L. R. 7 H. L 388; and compare In re Maybee, 8 O. L. R. 601, 4 O. W. R 421;; Alpin v. Stone,[1904] 1 Ch. 543.

Costs of all parties out of the moiety of which the gift ha failed—those of executors of the testator between solicito and client.

APRIL 5TH. 190

DIVISIONAL COURT.

BRADD v. WHITNEY.

Negligence—Injury to and Consequent Death of Boy Opera ing Calcium Lamp in Theatre—Duty of Employers Furnish Proper Appliances—Exposed Switch—Electri Current — Neglect to Provide Rubber Mitts — Thea Leased to Playing Company—Division of Gross Recei —Non-liability of Owners of Theatre— Findings of Ju —Misdirection—Nonsuit.

Appeal by defendants from judgment of CLUTE, J., up the findings of a jury, in favour of plaintiffs, the pare

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oy who was killed by an electric shock in a theatre by defendants, where he was employed by the company laying at the theatre to operate a calcium light, to r damages for his death, owing, as alleged, to the negli- of defendants, who by agreement shared gross receipts he playing company.

L. Counsell, Hamilton, for defendants.

W. Nesbitt, K.C., for plaintiffs.

e Judgment of the Court (BOYD, C., MAGEE, J., MA-.), was delivered by

YD, C.:—The lad was killed unquestionably by the ac- f electricity, but in what way it was brought about is if not entirely conjectural. That it was not because tact with the register is proved by two eye-witnesses— lled for the plaintiff and the other for the defendants. is no direct or other evidence to be placed against this. t, as the jury seems to have thought, that the accident from the touch of his hand on the exposed switch on mp, and that the fatal results might have been pre- had he been furnished with rubber mitts, the ques- ill remains, were the defendants liable on the ground ligence because no such gloves were provided? The annot be disputed that the lad was employed by the g company—that he was under the charge and direction ir electrician—that the officers or employees of that ny (that is, their stage manager and their electrician) ntire and sole control of the stage and its surround- and therefore of the place where the deceased was ing the calcium lamp and was killed. The electrician owners (Mr. Wark), though in charge of the house as sted with the stage, was yet in subordination to the ny's electrician for the purposes of the performance. efective calcium lamp was the property of the com- and by them supplied to the operator, and it was not oit, nor does it appear to be the duty, of the electrician owners (Mr. Wark) to inspect or criticize the lamps and supplied by the company in connection with the g's performance. Though Mr. Wark says he saw the on the stage, it was not till after the accident that he ed it. I do not understand that he had formed or have formed any opinion as to its being a proper lamp

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—one up-to-date—till after the disaster had occurred. I
does not appear that he had any duty or power to contro
the action of the company in regard to the kind of lam
which they supplied under the direction and supervision o
their own electrician—who was the one man in charge o
this line of operation. It was the business of the owner
to supply the electric current; the application of that to th
lamp was undertaken by and was the duty of the playin
company—according to the contract in writing.

There may be negligence in not providing a proper an
safe lamp, and there may be negligence in not also providin
rubber mitts for the operator. But the duty to obviate the
items of negligence rested upon the employers of the la
killed, who were at the time in exclusive occupation and co
trol of the stage and the calcium lights connected therewit
The learned Judge directed the jury that, as there was
joint enjoyment of the gross receipts derived from the pe
formance, it followed as a matter of law that there was joi
liability, if any negligence existed in the premises. Henc
if the playing company were guilty of negligence, that negl
gence was legally attributable to the owners also, and so th
jury found negligence quoad the defendants. I think th
this was misdirection in holding that a joint participatio
in the receipts involved joint liability if any negligence w
proved as to the company. In the lowest aspect of givi
relief against this, a new trial should be directed. But up
all the evidence I do not see enough to fix legal liabil
upon the owners in the circumstances of this case.

By the terms of the agreement the company agree
play the attraction named, being "The Wizard of Oz,"
the date specified, and the owners agree to furnish the thea
and all the properties contained in the theatre for the per
of one night and one matinee . . . and also to "furn
electric current for the company's calciums." It is agr
that there shall be no other entertainment of any kind in
theatre during the continuance of the said engagement,
that the gross receipts shall be shared so that 70 per c
shall go to the company.

The effect of sharing the gross receipts is but ano
mode of paying rent for the premises, and it does not indi
that any partnership existed. This agreement is much
that discussed in Lyon v. Knowles, 3 B. & S. 560, in whi
was said that the use of the theatre was made over to
company for the purpose of the performance . . .

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tre with its accessories, lights, etc., was under the direc- and control of the company.

The evidence in this case shews that the stage area was er the entire control and management of the company their officers, and no right of supervision or interference onceded to the owners of the theatre, which is an import- point of distinction between this and the case relied on Mr. Nesbitt of Flynn v. Toronto Industrial Exhibition ociation, 9 O. L. R. 582, 5 O. W. R. 550, where by the ns of the engagement the contractor was to be governed the rules of the association, and the manager of the asso- ion had large powers conferred as to the management l conduct of the merry-go-round. The contractor also eed to indemnify the association against any claims aris- from his negligence in the giving of the show. The ligence for which the defendants were held responsible the faulty material and construction of the centre part, ich collapsed—a defect which would have been ascertained ly by competent inspection. Mr. Justice Osler puts the ision against the defendants on the sole ground that by express terms of their agreement the defendants retained right of supervision and approval of the management l conduct of the show they authorized the contractor to e.

The present agreement I read (with the evidence) as giv- exclusive control to the company of the stage area in ich the deceased operated the company's lamp, and in which was fatally injured. There is no proof that the defective ure of the lamp provided by the company was known to owners before the accident occurred, and no duty was cast on or reserved to them of examining the lamps, the pro- ty of and provided by the playing company. Had this ht of control been also shared with the owners, as were financial returns, then the aspect of a partnership ven- e would have arisen, with probably, as its concomitant, nt liability "for any accident resulting from negligence:" Lyon v. Knowles, 3 B. & S. at p. 563.

It is to be emphasized that in this instance the defect hich lay apparently at the root of all the trouble was in the struction of the calcium lamp, the property of and given the operator by the company. Of that defect the owners l no notice or knowledge, and were not called upon to ard against any danger arising from the use of the lamp ring the performance.

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In Indermaur v. Dames, L. R. 1 C. P. 2
311, also cited, the matter of negligence la
defect or omission in the premises of the pr
the visitor was injured—a widely differen
from that now under discussion.

This operator had a right to expect th
the company, would furnish him with a
lamp, and that all the appliances therewit
as to ensure his reasonable safety—but I
stretch this kind of obligation to the case
the theatre. In my opinion, the case fail
should be dismissed. . . .

A

DIVISIONAL COURT.

RE JONES AND CITY OF OT

*Municipal Corporations — By-law Establis
Collection and Disposal of Garbage and R
by Contractors—Disposal within Munic
of Land—Special Rate—Vote of Ratepo
of Private Rights—Confiscation of Priv*

Appeal by James Jones and one Savig
FALCONBRIDGE, C.J., ante 323, dismissing
cation to quash a by-law.

F. B. Proctor, Ottawa, for the appellan

T. McVeity, Ottawa, for the city corpo

THE COURT (BOYD, C., MAGEE, J., M
with the opinion of the Judge of first inst
one ground of objection. They conside
objectionable in so far as it assumed t
holders from disposing of their productiv
table-waste, to dealers. Order below varied
6 and 13 of the by-law. No costs here or

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THE

NTARIO WEEKLY REPORTER

(To and Including April 13th, 1907).

IX. TORONTO, APRIL 18, 1907. No. 14

DELL, J. April 6th, 1907.

CHAMBERS.

REX v. COLAHAN.

ninal Law—Imprisonment for Non-payment of Fine and Costs—Warrant of Commitment—Tender of Fine and Costs—Refusal of Keeper of Gaol to Accept—Rule of Prison as to Time of Day when Payment Accepted—Unuthorized Rule — Discharge of Prisoner upon Habeas Corpus.

Motion by defendant, upon the return of writs of habeas ous and certiorari in aid, for an order for his discharge n the custody of the keeper of the common gaol for the nty of York.

J. B. Mackenzie, for defendant.

T. L. Monahan, for the Crown.

Riddell, J.:—Many objections were taken to the prolings before the convicting magistrate, involving several ts of more or less difficulty in the interpretation of the ninal Code. I do not pass upon any of these objections is not being an application to quash the conviction—as ink the application must succeed upon another ground. Assuming the conviction to be unexceptionable, the war- of commitment provides: 'And I do hereby command the said keeper of the said common gaol, to receive the James Colahan into your custody in the said common , there to imprison him (and keep him at hard labour) the term of 30 days, unless the said several sums (and s and charges of carrying him to the said common gaol, unting to the further sum of 60 cents) are sooner paid

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unto you, the said keeper." The amount of fine was $1
and of costs $10—the whole sum to be paid being th
$20.60.

Defendant, having been apprehended under this warran
was taken to the common gaol and received by the gaol
on 12th March. He thereupon the next day, through h
solicitor, requested one Spencer to raise the money and pa
it. Spencer accordingly raised the sum required, $20.60, ar
on 14th March, at 10 minutes before 8 o'clock in the afte
noon, tendered the money to the person in charge of th
gaol, the deputy keeper. He refused to receive the mone
on the ground that there was a rule of the gaol that no pe
son could or would be released, on payment of his fine afte
5 o'clock in the afternoon, until the next morning. At th
same time Spencer was informed that there was no use h
going to offer the amount to the keeper himself, who, a
he was given to understand, was not in the gaol, as this ru
was in force governing all in the gaol.

It appears that this rule is not in the printed book o
rules, and that nothing of the kind exists in print, except
notice in front of the gaol to the effect that "no fine wi
be received or bail allowed after 5 p.m."

Defendant was entitled to his liberty upon paying to th
keeper, or to the person intrusted by the keeper with autho
ity for such purpose, the sum mentioned in the warran
The deputy keeper was clearly a person put by the keeper
his place for such purpose, and the tender was all that cou
be done by or on behalf of the prisoner towards paymen
This tender was at a reasonable time, and the only questi
remaining for decision is as to the effect of the "rule."

No statutory authority exists for the imposition of su
a rule, even if made by the inspector: R. S. O. 1897 ch. 3
sec. 12 (1); or if by the county council: sec. 12 (2). T
power to pass regulations does not extend so far as to p
vent a prisoner, through his solicitor or agent, transacti
business at any reasonable time with any one—keeper
deputy keeper included. And no common law power can
think, be found inherent in keeper, county council, or
spector justifying such a rule.

No doubt, full authority exists for rules and regulati
for the governance of prisons and for the conduct and c
trol of those within, but I cannot conceive of the comm
law vesting in any individual such arbitrary power of in
fering with the common law rights of the subject. Of cou

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›edience to such a rule, if the rule itself be not justified, ınnot be insisted upon. . . .

[Reference to Cobbett v. Grey, 4 Ex. 729; Burt v. Lavnder, 1 C. & P. 659.]

The warrant of commitment must be followed strictly; ıd upon the prisoner in the present case causing the tender › be made, he should have been released. He must be disıarged.

If I have power to order that no action is to be brought ɜainst any person for the imposition of the rule mentioned r for the continued imprisonment of the applicant after ıe tender, I make such order.

ıIDDELL, J. APRIL 8TH, 1907.

CHAMBERS.

RE STURGIS, STURGIS v. VAN EVERY.

loney in Court—Issue of Cheque in Favour of Person Entitled—Refusal to Accept—Loss of Cheque—Application for New Cheque after Long Delay—Interest—Costs.

Motion by George Sturgis for an order directing the issue a new cheque by the Accountant of the Supreme Court of ıdicature for Ontario for the amount standing in Court to e credit of the applicant, he having refused to accept a eque formerly issued, and afterwards lost or destroyed.

W. E. Middleton, for applicant.

F. W. Harcourt, for Accountant of Supreme Court.

RIDDELL, J.:—Some 17 years ago, H., a solicitor in Stratd, was instructed by one of the parties to this action to for her out of Court the money to which she was entitled. › at the same time instructed him to procure the money which her brother George Sturgis was entitled in the ıe action. H. did so, the cheque being for $41.12. George rgis, upon being informed of this, repudiated the solicis authority, refused to accept the cheque, and was dissfied with the amount. He was then and is now residing of the jurisdiction; and, as he says in his affidavit, he nded coming to Ontario to discuss the matter with the r members of his family before taking the money that then in Court to his credit. Upon the repudiation of

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his authority, the solicitor sent the chequ
Toronto for cancellation. What ultimat
cheque does not appear with certainty, b
destroyed years ago, the last trace whicl
being more than 15 years ago. H. has ce
tor.

Recently George Sturgis applied, throu
the amount, having taken no proceedings
He was informed (and rightly so) that
standing cheque, an application must be
and he accordingly caused the present m
He claims the amount with interest as tho
had been issued, and also costs to be pai
in the Accountant's office.

I reserved judgment that I might le
ter. Having now had an opportunity
number of my brother Judges, I think
to make is that the former cheque
celled, a cheque issued for the original an
applicant was entitled, and interest compu
and that there be no costs of the applicatio
not be reasonable to deprive the applicant
est, as though the signing and issue of th
as a withdrawal of the money from the
investments made by the Court, it must b
the Accountant's office exists and the Co
primarily for the protection of infants a
not competent to deal with their own prop
cannot be found. The machinery of the
intended as a convenience for those who
who know their rights; and it is the dut
position to apply for and receive out of
which they may be entitled at the earliest
possible. Money belonging to those sui j
allowed to remain in Court for an indefi
fortiori in this case, when George Sturgis
tor was affecting to act for him and had
a cheque for his money, it was his duty t
am not inclined to do anything which car
approval of this neglect.

Then as to costs: the trouble in the
caused by the solicitor acting without autl
plication been made promptly, no doubt
have been ordered to pay the costs occa

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horized act. This cannot now be done. I think, therefore, applicant must bear his own costs.

All proper entries will be made in the books of the Ac-ntant's office to carry out the terms of this order.

DELL, J. APRIL 8TH, 1907.

CHAMBERS.

MOORE v. CITY OF TORONTO.

mmary Judgment — Rule 616—Refusal—Appeal—Amend-ment—Duty of Municipal Corporation as to Defending Frivolous Actions.

Appeal by defendants from order of Master in Chambers sing defendants' motion for summary judgment under e 616 upon the pleadings and admissions of plaintiff.

F. R. MacKelcan, for defendants.

J. W. McCullough, for plaintiff.

RIDDELL, J.:—Without laying down any general rule, I k, under the circumstances of this case, I should not in-ere with the order made by the Master. The whole matter be most conveniently threshed out before the trial ge.

It was argued for defendants that unless motions of this l were given effect to, the result would be that the de-lants would or might be inclined to pay some reasonable rather than contest an utterly unfounded claim. I have ay that I hope no such practice will ever be even con-red by any municipality. A municipality does not exist the purpose of making money or even of saving money at azards—if that were so, the ground around the city hall ht be utilized as a potato garden. While it is the duty hose in charge of the affairs of the city to save the money e citizens by all proper means, it were an improper course ursue to pay money to any one who is clearly not entitled t, for fear that the city might be put to expense. Such urse is an encouragement of unfounded actions and is valent to paying blackmail. A private individual may

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do what he likes with his own if he keep on the windy sid of the law, as may a corporation formed for commercial pu poses, but it would be a breach of trust on the part of tho intrusted with the management of the affairs of a municip corporation to follow any such course. Of course, cases i which there is a real and bona fide contest are in a differen category.

However that may be, this case does not seem to me to b one in which the plaintiff may not by a proper amendmen of his pleadings, as is to be applied for, or otherwise, have right to some relief. At all events the trial Judge will be i the best position to determine.

Costs in the cause to the plaintiff.

ANGLIN, J. APRIL 8TH, 190

WEEKLY COURT.

RE TAYLOR AND MARTYN.

Vendor and Purchaser—Contract for Sale of Land—Requ sitions on Title—Discharge of Mortgage by Executor Mortgagee—Necessity for Registration of Probate of W —Local Improvement Rates — Apportionment as Tax or Incumbrance Removable by Vendor—Municipal A sec. 681.

Application under the Vendors and Purchasers Act by t purchaser for an order directing the vendor to comply w certain requisitions of the purchaser in respect of title.

T. H. Luscombe, London, for purchaser.

U. A. Buchner, London, for vendor.

ANGLIN, J.:—Upon the argument I disposed of a num of questions raised, reserving judgment upon two points so dealt with.

The first of these concerns a discharge of mortgage gi in 1888 by the executor of one George Stevens, the m gagee. The probate of the will of George Stevens is registered, and the purchaser requires such registration.

The second objection concerns local improvement r chargeable against the property, and the question is whet these are apportionable as "taxes, rates, and assessmen or constitute an incumbrance which the vendor must rem

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ınder his covenant to convey the lands "freed or discharged from all dower or other incumbrances."

As to the first point, the purchaser being entitled to a registered title, the vendor is bound to register the probate of the will of the late George Stevens.

The second objection raises a question which is perhaps more debatable. The legislature has declared that local improvement rates are not charges which constitute a breach of covenant by a vendor that he has done no act to incumber: 3 Edw. VII. ch. 19, sec. 681; 54 Vict. ch. 42, sec. 35.

In Graydon v. Hammill, 20 O. R. 199, decided before this legislation, it had been held that local improvement rates were incumbrances which a vendor was bound to remove, notwithstanding a provision in the contract of sale for apportionment of "taxes." This case was followed in Armstrong v. Auger, 21 O. R. 98 . . . In these cases rates for local improvements carried out on the initiative of the city engineer, as well as for improvements made upon petition of property owners, are dealt with, and both are held to be incumbrances which a vendor, who agrees to convey free from incumbrances, must remove.

In support of his contention that the legislation above referred to does not affect the right of a purchaser before conveyance to have the property freed from charges affecting for local improvements, counsel for the purchaser cites Armour on Titles, 3rd ed., pp. 168, 170. Mr. Armour expresses the opinion that, inasmuch as the statute merely declares that "the petitioning for or procuring to be made the making of any such improvements, or the charging of the costs thereof upon or against real property, or the fact that they are a charge upon or against such real property, shall not be deemed to be a breach of the covenant by a vendor person agreeing to sell that he has done no act to incumber the real property, except to the extent that the annual or other payments in respect of such charge are in arrear or unpaid," local improvement rates have not ceased to be in fact incumbrances, and, while a grantee under a conveyance may not, because of this legislation, be in a position to allege breach of a covenant contained in his deed, against incumbrances created by the grantor, the position and rights of a purchaser under an executory agreement are not affected by the statute. Mr. Armour's view is that as to such a purchaser the decisions in Graydon v. Hammill and Armstrong v. Auger are still effective. While I fully appreciate the difference

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between the relative rights and positions o
chaser before and after conveyance, I do n
ute as restricted in its operation to the la
purports to deal with "vendors and persons
It seems manifestly intended to cover the
entering into an executory contract of s
"agreeing to sell" are used in their ordi
I see no valid reason for reading these
"having sold and conveyed." The legisl
covenant by such a person that he has don
ber shall not be deemed broken by reason o
improvement rates upon or against the pro
"covenant" is, no doubt, an inapt term to
ment which may not be under seal. But,
this legislation, on that account, to cases in
by instrument under seal covenants that
to incumber, I should, I think, fail to give d
to sub-sec. 41 of sec. 8 of the Interpret
enacts that "every Act and every provis
thereof shall receive such fair, large, and
tion and interpretation as will best ensu
of the object of the Act and of the provis
according to the true sense, meaning, and

So interpreting sec. 681 of the Munici
expressly extended to executory contracts
difficulty in treating the word "covenant,"
fined to an express covenant, as includin
express or implied, that the vendor had n
property, though the agreement to sell sh
seal. The agreement in the present case
to have been under seal.

But here the agreement of the vend
"that he has done no act to incumber;" i
convey the lands freed or discharged
brances." Though no longer to be regard
effected, or (if the words of the covenant
as having the extended meaning given t
Forms Act) "suffered" by the vendor, l
rates have not ceased to be what the Cou
Hammill and Armstrong v. Auger, declar
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I have been referred to no case in w
tion of sec. 681 of the Municipal Act ha

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ıtion of the Courts, and I have found no decision upon it. my opinion, though applicable, quantum valeat, to a ıdor before conveyance, it does not relieve him of liabi- to remove a charge for local improvement rates, where is bound to convey free from incumbrances, notwithstand- the purchaser's agreement to assume "all taxes, rates, l assessments wherewith the lands may be rated or arged" from and after the date fixed for completion of sale.

I cannot but think that this legislation was intended have a much wider effect. It is generally understood have been passed in consequence of the decision in Gray- n v. Hammill. But Courts can only give effect to intention of the legislature so far as it has been ex- essed, and I find no ground upon which I should feel rranted in extending to a covenant to convey free from incumbrances a saving clause which is in terms confined its application to a covenant that the vendor has done act to incumber.

On the argument counsel for the vendor stated his ıdiness to supply evidence that no dower had attached the property by reason of the seisin of one Buckle. The rchaser must satisfy himself by the usual searches as to tries in the general register and executions affecting the ıds in the hands of the sheriff.

An order will issue in accordance with the foregoing inion. The purchaser will have his reasonable costs of is petition from the vendor.

APRIL 8TH, 1907.

DIVISIONAL COURT.

ANK OF BRITISH NORTH AMERICA v. AUSTON.

omissory Note—Indorser—Surety—Discharge—Intimation by Holder that Note Paid by Maker—Mistake—Absence of Prejudice.

Appeal by defendant Lahay from judgment of WIN- ESTER, Judge of County Court of York, in favour of intiffs in an action in that Court upon a promissory note r $250, discounted by plaintiffs. The appellant was an dorser of the note. He was told by a subsequent indorser, o was told by plaintiffs, that the note had been paid. e note was in fact not paid.

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A. B. Morine, for the appellant, contended that he altered his position on the faith of the statement, supposing that the makers of the note, who were indebted to him, had paid it; that in law he was a surety, to the knowledge of plaintiffs, and the plaintiffs owed him the duty which a creditor owes to a surety, and they not having performed it, he was discharged.

R. H. Greer, for plaintiffs.

The judgment of the Court (BOYD, C., MAGEE, J., MABEE, J.), was delivered by

BOYD, C.:—The language of Cameron, J., in Canadian Bank of Commerce v. Green, 45 U. C. R. 81, must be read with reference to the questions raised on the demurrer. The plea objected to alleged that by false or untrue statement as to payment of the note the surety was induced to remain inactive, so that, by the absconding of the party from whom the surety could have obtained indemnity, he was deprived of that benefit, and so was discharged. This was held a good plea, and the learned Judge said, in general language: "When a creditor allows a surety to believe that the principal has discharged the obligation in respect of which the surety is bound, though he is mistaken and has acted in good faith, he nevertheless thereby discharges the surety." But such a discharge would obtain only if the surety had suffered detriment by relying on the misstatement. This is recognized by the Judge, who says later on in his very short judgment: "The mischief to the surety . . . would result from this carelessness of the creditor." But if no mischief results there is no discharge.

I think the rule of English law is laid down in the language of Shaw, C.J., in Carpenter v. King, 9 Metc. 511, that where a creditor knowing one debtor to be a surety for another, who is a principal, gives him notice that the debt is paid by the principal, and the surety in consequence changes his situation as by surrendering security, or forbearing to obtain security when he might, or otherwise suffers loss by it, he is discharged. The doctrine is neatly put in 27 Am. & Eng. Encyc. of Law, 2nd ed., p. 502, that a creditor is precluded from enforcing an obligation against a surety, where the surety acting upon representations made by him foregoes the purpose of seeking relief or of taking indemnity at the time when it may be had; and among the

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cases cited is the one in 21 Pick. 195, Harris v. Burks. This case is cited in Stearns on Suretyship as if deciding that if the surety is mistakenly told that the debt is paid he is forthwith discharged irrespective of any actual damage. But that appears to be an erroneous reading of the case. The decision was in 1838, and by Shaw, C.J., who later made the declaration of law I have cited from Carpenter v. King, in 1845, where he cites the earlier case of Harris v. Burks in support of the proposition that if a creditor mistakenly informs a surety that the debt has been paid by the principal debtor, and the surety afterwards relinquishes security given him by the principal — such combination of circumstances forms a good defence. Harris v. Burks is well explained in Turnbull v. Okeson, 36 Pa. St. 519, as being a case which rested not only on the declaration by the creditor that the debt was paid, but also on superadded evidence that actual loss had resulted from this lulling into security.

I need not labour the matter further. Upon the proper reading of the evidence in this case, I do not conclude that any representation as to payment was made by the bank to the defendant, and, secondly, even if such representation had been made, there is no evidence that defendant did or forbore doing anything in consequence of the information which made for his prejudice.

In all aspects the judgment is right and should be affirmed with costs.

RIDDELL, J. APRIL 8TH, 1907.

CHAMBERS.

GRAND TRUNK R. W. CO. v. CITY OF TORONTO.

Summary Judgment—Rule 603—Delay in Moving—Motion Made before Expiry of Time for Delivering Statement of Claim—Defence to Action—Invalidity of Orders of Railway Committee of Privy Council—Adverse Determination in Previous Action—Res Judicata—Ultimate Appeal to Privy Council.

Appeal by plaintiffs from order of Master in Chambers refusing motion for summary judgment under Rule 603.

D. L. McCarthy, for plaintiffs.

F. R. MacKelcan, for defendants.

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RIDDELL, J.:—In 1904 the Grand Trunk Railway Company of Canada brought an action against the Corporation of the City of Toronto, to recover from defendants, under the provisions of certain orders of the Railway Committee of the Privy Council, a certain proportion of their expenses in maintaining and protecting certain level highway crossings. The defendants, amongst other defences, pleaded that the Railway Committee had not authority or jurisdiction to make such orders, and "such orders are not binding upon the defendants." There was no dispute as to the amount, and at the trial, which took place before the Chancellor in November, 1904, the whole contest was as to the law. The trial Judge held that the defence could not prevail. An appeal was taken to the Court of Appeal for Ontario, who affirmed the judgment. An appeal to the Supreme Court of Canada was equally unsuccessful: City of Toronto v. Grand Trunk R. W. Co., 32 S. C. R. 232. The city corporation then applied to the Judicial Committee of the Privy Council for special leave to appeal, and this was refused on 16th July, 1906. That these orders are binding upon the defendants is now res adjudicata.

On 9th October, 1906, the writ of summons in this action was issued, whereby plaintiffs claimed payment of certain sums under the same orders. It is admitted that in this action also there can be no dispute as to the amounts, and that the whole matter that can possibly be tried is the validity of the same orders as were considered and passed upon in the former action. An appearance was entered on 10th October. No statement of claim was delivered, but on 3rd January, 1907, a motion was launched before the Master in Chambers for summary judgment under Rule 603.

The Master gave judgment dismissing the motion, the reasons for the judgment being as follows:—

"The writ was served on 10th October, and appearance was entered on 12th. The present motion was only launched on 3rd January instant. The delay was not explained. This brings the case within the decision in German American Bank v. Keystone Sugar Co., 8 O. W. R. 634, and the motion must be dismissed.

"In any case, considering the parties and that plaintiffs, if ultimately successful, are in no peril of losing either debt or costs, it seems better to allow defendants to have the opportunity of attempting to free themselves, either in

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whole or in part, from a perpetual charge of over $3,000 a year. Defendants should in every way facilitate the trial and waive the three weeks given in Rule 542 (4), as in the present case this will be merely a formal step in an attempt (if possible) to obtain a hearing before the Privy Council, in spite of their previous refusal to allow an appeal from the adverse decision of the Supreme Court on the same point.

"The costs will be in the cause."

. . . In addition to the ground upon which the Master based his judgment, counsel for defendants relied upon the fact set out by Mr. Rust in the affidavit filed in answer to the motion, viz., that a similar action had been brought in the High Court by the Canadian Pacific Railway Company against the city corporation to recover a portion of the cost of maintenance of protection at certain other crossings, and that, though judgment had gone against defendants, they were in good faith prosecuting an appeal in the Court of Appeal, and intended to carry the case to the Privy Council, in the event of the judgment of the Court of Appeal being adverse. He argued that it might be that the Judicial Committee would upon such appeal hold that the Railway Committee had no jurisdiction to make the orders in question in that action, and consequently the orders sued upon in this action would also be invalid. Frankly stating that there was nothing in dispute in this action except the validity of the orders in favour of the Grand Trunk Railway Company (as indeed is manifest from the affidavit of Mr. Rust), he argued that if the Judicial Committee held in favour of the defendants in the action of the Canadian Pacific Railway Company, defendants might have a defence to this action.

I do not think that contention can prevail. Everything that can be litigated here is res adjudicata, and would not cease to be res adjudicata if it turned out that the judgment was wrong.

The law is so well established that it were superfluous to quote authorities. The notes to The Duchess of Kingston's Case, 2 Sm. L. C., 11th ed., p. 731, Black on Judgments, sec. 503 et seq., and Hukm Chand's work on Judgments, p. 10 et seq., collect all the authorities. Reference may be made also to Bigelow on Estoppel, 5th ed., ch. 3. The rule is thus laid down in 2 Sm. L. C.., at p. 772: "It seems that the circumstance that the former judgment was erroneous

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. . . cannot, so long as that judgment stands unreversed by a competent Court, be set up in answer to its effect by way of conclusion."

The effect of a judgment for an instalment of a debt alleged to be due, upon an action to recover the remainder is shewn in In re South American and Mexican Co., Ex p. Bank of England, [1895] 1 Ch. 37.

As to the ground taken by the Master in Chambers, I concur in the statement that the intention of the Rule was that the plaintiffs should apply within a reasonable time after the appearance of the defendants. That was laid down in McLardy v. Slateum, 24 Q. B. D. 504, at p. 506. But it must be remembered that in that case a statement of claim and statement of defence had been delivered, and, while the plaintiff had delayed about a month after the delivery of the statement of defence, the learned Baron who gave the judgment of the Court was considering the question whether the fact of the delivery of a statement of defence was a bar to an application under this Rule—he was not considering, nor did the Court decide, whether a motion made without delivery of a statement of claim at all, and within the time limited for the statement of claim, or within any time, was made within a reasonable time.

So, too, in Ontario Bank v. Farlinger, 7 O. W. R. 315, my Lord the Chief Justice was dealing with a case in which there had been a statement of claim and a statement of defence delivered; and both in this and in the English case the Court in speaking of the application being made after the ordinary time meant after and not before delivery of statement of defence. . . .

These cases are no authority for the case of German American Bank v. Keystone Sugar Co., 8 O. W. R. 634, a judgment of the Master in Chambers, which he has followed in the case now under review. I decline to follow the German American case.

A plaintiff has 3 months after appearance to deliver his statement of claim: Rule 243 (b.); and, except in special circumstances, he cannot be deprived of his right to take the whole of that time in considering whether he will file a statement of claim, and I think a plaintiff must be considered as applying "within a reasonable time after the appearance of the defendant" (24 Q. B. D. 506) if he serve his notice of motion so soon that the motion may be heard

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before the time fixed for the delivery of the statement of claim.

It may be that he may apply at any time before the delivery of statement of defence—that, I think, is indicated in the two cases cited—or before the time in which the statement of defence might be delivered if he were to deliver his statement of claim within the 3 months; but the time that I have mentioned, it seems to me, is the shortest time to which he can be limited, freed from all obligation "to shew that the delay is justifiable under the special circumstances of the case:" 24 Q. B. D. at p. 507.

If I am right, there is and can be no defence to this action, and the motion must prevail. . . . . Jones v. Stone, [1894] A. C. 122, cited by Mr. MacKelcan, is not in point. In that case, as is pointed out by Lord Halsbury at p. 124, there were "very serious questions of fact in debate which never ought to have been determined in a summary manner under Order XIV."

Jacobs v. Booth's Distillery Co., 50 W. R. 49, 85 L. T. R. 262, lays down the proper principles authoritatively. Where, assuming all the facts in favour of the defendants, they do not amount to a defence at law, then and only then an order should be made for judgment under this Rule. Such is the case here.

The appeal will be allowed and judgment entered for plaintiffs with costs here and below.

RIDDELL, J. APRIL 8TH, 1907.

CHAMBERS.

RE ERRINGTON v. COURT DOUGLAS NO. 27 CANADIAN ORDER OF FORESTERS.

Division Court — Jurisdiction — Action against Benefit Society—Domestic Forum—Error in Finding of Judge in Inferior Court—Error Giving Jurisdiction.

Motion by defendants for prohibition to the 8th Division Court in the county of Huron.

W. Proudfoot, K. C., for defendants.

Hugh Morrison, Lucknow, for plaintiff.

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RIDDELL, J.:—The affidavit filed on behalf of defendants . . . sets out that defendants at the trial did "decline to enter into any defence or give any evidence as to the merits of the case, on the ground that the plaintiff had not adduced or attempted to adduce any evidence that he had taken the various appeals to the domestic forum provided for by . . . clause 70 of . . . constitution, and asked for a nonsuit on the ground that jurisdiction in the . . . Division Court had not been established."

It was argued before me:—

1. That unless and until all the appeals provided by the domestic forum should be exhausted, the Division Court had no jurisdiction.

2. That the County Court Judge had erred in finding that the plaintiff "had exhausted every possible means of redress in the domestic forum."

3. That by such error he had given himself jurisdiction, which otherwise he would not have had.

For the first proposition were cited Zilliax v. Independent Order of Foresters, 13 O. L. R. 155, 8 O. W. R. 631, and cases referred to therein. But I did not in that case intend to decide, and I do not think I did decide, that the Court has no jurisdiction to consider and dispose of an action such as this until the domestic remedies are exhausted, but simply that the Court would not entertain such action: Essery v. Court Pride of the Dominion, 2 O. R. 596, at p. 606, per Boyd, C.; Field v. Court Hope of Ancient Order of Foresters, 26 Gr. 467, at p. 475, per Blake, V.-C.

But, even though the effect of these cases is as contended, defendants are not advanced. The subject matter of the litigation is within the jurisdiction of the Division Court, and, such being the case, the Judge below "may . . . misdecide the law as freely and with as high an immunity from correction except upon appeal as any other Judge:" In re Long Point Co. v. Anderson, 18 A. R. 401, at p. 408, per Osler, J.A.

The question to be decided by the Judge was not whether the jurisdiction of his Court was ousted, and he must leave the determination of the matter at issue to the County Court or High Court; but whether such an alleged cause of action gave the plaintiff any rights at all; the question was not "In which Court is the action to be brought?" but "Can such an action succeed in law?" And there I have no more right to dictate to the learned Judge

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than he has to dictate to me—he is master in his own house.

Upon the second point taken, I do not think that this Court has any right to inquire into the correctness of the finding. If the Judge is wrong (and I am not suggesting that he is wrong), his finding cannot be interfered with, this proceeding not being an appeal.

My conclusion is that the Judge has not given himself jurisdiction by any error—but that any mistake he may have made is made in a matter within his jurisdiction to try.

All the cases will be found in the arguments in In re Long Point Co. v. Anderson and Re Township of Ameliasburg v. Pitcher, 8 O. W. R. 915, and in Bicknell & Seager's Division Courts Act, ed. of 1900, pp. 63, 66.

The motion will be dismissed with costs.

CARTWRIGHT, MASTER. APRIL 9TH, 1907.

CHAMBERS.

GEEDY v. WABASH R. R. CO.

Venue—Place of Trial Named in Indorsement on Writ of Summons—Another Place Named in Statement of Claim—Motion to Strike out—Waiver of Irregularity by Previous Motion to Change Venue.

Motion by defendants to strike out the statement of claim or to compel an amendment of the part naming St. Thomas as the place of trial, Simcoe having been named by plaintiffs in the writ of summons. See the report of former motion, ante 507.

H. E. Rose, for defendants.

J. H. Spence, for plaintiffs.

THE MASTER:—The Simcoe assizes are past; the St. Thomas sittings begin on 22nd instant.

For the motion Segsworth v. McKinnon, 19 P. R. 178, is relied on. In answer it was said that there the writ of summons was specially indorsed, and therefore a venue was properly given in the writ; but here the proper practice is not to name any venue in the writ, and that, therefore, it might be treated as mere surplusage, or, if this view could not be sustained, that the variance in the statement of claim was only an irregularity, which had been long since

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waived under Rule 311, especially as this ground had not been taken on the previous motion to change the venue, when it might have been of some weight as indicative of the original view of plaintiffs' solicitor that Simcoe was the proper place for trial of the action.

Had the variance been noticed before delivery of statement of defence, there would have been no difficulty in having the venue placed at Simcoe, as the statement of claim was clearly irregular. I think I have so decided in more than one instance, though I cannot recall any reported case on the point.

Had this ground been taken on the previous motion, I am inclined to think that it would have turned the scale in defendants' favour. It is very unfortunate that the fact was not sooner brought to the notice of their solicitor by defendants. But, as it is, I do not think plaintiffs should now be thrown over, which would be the necessary effect of a change of venue, on a ground which was open to defendants a long time ago, and which they must now not unfairly be considered to have waived.

It would be well if solicitors, when issuing writs of summons, would refrain from naming any place of trial, unless the writ is specially indorsed. The contrary practice often leads to inconvenience and embarrassment later on.

The present motion cannot prevail, for the above reasons. But, while I feel obliged to dismiss it, I do so without costs.

CARTWRIGHT, MASTER. APRIL 9TH, 1907.

CHAMBERS.

RIGHT OF WAY MINING CO. v. LA ROSE MINING CO.

Discovery—Inspection of Defendants' Premises—Application by Plaintiffs before Statement of Claim—Rules 1906, 1908—Adjacent Mines—Trespass.

Motion by plaintiffs under Rules 1906 and 1908 for an order allowing them to inspect the property of defendants adjacent to their own.

W. E. Middleton, for plaintiffs.

J. B. Holden, for defendants.

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THE MASTER:—After the judgment reported ante 513, which decided that the right of way through defendants' location never passed to them, plaintiffs at once commenced this action to restrain defendants from trespassing on the right of way; they also ask damages for the past trespasses and an account of all ore or minerals wrongfully removed by defendants from said strip. The writ of summons was issued on 15th March, and on the same day an interim injunction was granted, which has since been continued until the trial. . . .

The motion is made before delivery of statement of claim. . . . It was stated on the argument that defendants have admitted a trespass on the upper level, but not on the lower, and plaintiffs desire to see how this is, so as to state their case according to the facts. They also wish to ascertain how much ore has been removed from the strip, so as to be able effectually to prosecute their claims for damages if the judgment already given is ultimately sustained.

No cases on the point are to be found in our Courts, but such are not infrequent in British Columbia. These, as well as the English cases, are collected in Martin's Mining Cases, vol. 1, p. 223, giving a full account of the judgment and orders in Esquimalt and Nanaimo R. W. Co. v. New Vancouver Coal Co., 6 B. C. R. 194. There the Court, on appeal, affirmed the order for inspection . . . saying: "But from the special circumstances of this case, we think this inspection is warranted, for without any fault on either side the evidence may be entirely lost and destroyed, as by the accidental flooding of the mine, unless the inspection is made at once."

This point was not unfairly emphasized by plaintiffs' counsel. He pointed out that by some similar accident the ways and workings of defendants, on their own property as well as on that of plaintiffs, might be so damaged and filled up with rubbish and débris as to prevent any satisfactory evidence being given of what has been, to some extent, admittedly taken out by defendants.

Against the motion counsel cited the following cases: Barlow v. Bailey, 18 W. R. 783; Bartley v. Kynoch, L. R. 9 Eq. 90; Mayor of Bradford v. Ferrand, 86 L. T. N. S.

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497. None of these cases, however, deals with mines, so that they scarcely seem to be in point.

Attention was also drawn to the difference between the British Columbia Rule 514, which is identical with English Rule 659, and our Rule 1096. But, on consideration, I am not able to say that our Rule has a more restricted application than the British Columbia Rule 514.

In the special circumstances of this case, I think the order should be made. Plaintiffs have a judgment in their favour. Defendants admit having trespassed on one level and having removed ore, as they thought they were entitled to do. They do not admit or deny trespassing at the lower level, and plaintiffs are entitled to see how that is, as it may be necessary to the relief to which they are now prima facie entitled.

The order will be similar to that to be found at p. 226 of Martin's Mining Cases, so far as applicable or necessary. The costs will be in the cause. . . .

MABEE, J. APRIL 9TH, 1907.

CHAMBERS.

WADE v. ELLIOTT.

Venue—Motion to Change — Preponderance of Convenience—Witnesses—Expense—Terms.

Appeal by defendant Elliott from an order of Master in Chambers refusing to change venue from Toronto to Cobourg.

J. H. Spence, for appellant.

A. C. McMaster, for plaintiff.

MABEE, J., dismissed the appeal with costs.

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APRIL 9TH, 1907.

DIVISIONAL COURT.

TCHELL v. COLONIAL INVESTMENT AND LOAN CO.

rtgage—Building Society—Terminating Shares—Payment —Interest — Amount Necessary to Discharge Mortgage— Accelerated Payments.

Appeal by plaintiff from judgment of MAGEE, J., ante 9, dismissing action.

John MacGregor, for plaintiff.

A. McLean Macdonell, for defendants.

THE COURT (MEREDITH, C.J., MACMAHON, J., TEETZEL, , dismissed the appeal with costs.

APRIL 9TH, 1907.

DIVISIONAL COURT

ANDERSON v. ROSS.

enant—Restraint of Trade—Termination of Partnership— Covenant not to Carry on Similar Business—Carrying on Business as Agent or Manager for Another.

Appeal by defendant from judgment of MABEE, J., 8 W. R. 691, dismissing the defendant's counterclaim to over damages for an alleged breach of a covenant of intiff contained in articles of co-partnership between her l defendant.

The appeal was heard by MEREDITH, C.J., MAGEE, J., UTE, J.

H. Cassels, K.C., and R. S. Cassels, for defendant.

E. E. A. Du Vernet, for plaintiff.

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MEREDITH, C.J.:—The covenant is in the following form: "From and after the determination of this partnership, the said Anderson (plaintiff) shall not engage in or carry on or be interested in, directly or indirectly, any business in the town of Port Arthur competing or interfering with the business of the said Ross (defendant), and the said Anderson covenants and agrees that her husband, the said Adam C. Anderson, shall not, after the determination of this partnership, carry on or engage or be interested, directly or indirectly, in any business in the town of Port Arthur which shall compete or interfere with the business of the said Ross."

The partnership business was that of jewellers, and by the terms of the articles it was provided that plaintiff should procure her husband, Adam C. Anderson, to work in the business and to devote his whole time and attention to it, and that she should pay him for so doing out of the salary of $125 a month which by another provision of the articles each partner was to be paid, and that no charge should be made against the partnership for the services of the husband.

After the dissolution of the partnership, the plaintiff's husband entered into the employment of one D. F. Burke, as manager of a jewelry business belonging to Burke, upon premises in Port Arthur situate in close proximity to the shop at which defendant is now carrying on the business which had been carried on by the partnership.

It is not open to question that the business of Burke is one which competes with the business of defendant.

The question for decision is, whether what has been done by the plaintiff's husband is a breach of her agreement with defendant; in other words, whether what the husband is doing is carrying on or engaging or being interested, directly or indirectly, in a business in Port Arthur which competes or interferes with the business of defendant.

I find it impossible to deduce from the cases, of which there are many, any clear principle which is to be applied in determining the meaning of such a covenant as that which is in question in this case, unless it be that the guiding rule is to construe it so as to carry out the objects and intention of the parties, so far as the language of the covenant will fairly allow and no further: per A. L. Smith, L.J., in Smith v. Hancock, [1894] 2 Ch. 377, at p. 390.

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What then were the objects and intention of the parties in this case? Manifestly they were, so far as the acts of plaintiff's husband were concerned, to prevent him from using his knowledge and skill in a business in Port Arthur which competed or interfered with that carried on by defendant.

It is highly improbable, I think, that the parties to the partnership articles had not in mind the possibility of the husband, after the termination of the partnership, taking just such a part in a competing business as he was under the provisions of the articles to take in the partnership business, and that they did not intend that he should be precluded from doing so.

Then, assuming what I have mentioned to have been the object and intention of the parties, is the language which they have used such as to embrace within the prohibition of the covenant the acts of the husband which, according to the contention of defendant, constitute a breach of it?

. . . .

[Reference to Ward v. Byrne, 5 M. & W. 548; Bird v. Lake, 1 H. & M. 338; Allen v. Taylor, 18 W. R. 888, 19 W. R. 35, 556; Rolfe v. Rolfe, 15 Sim. 88; Newling v. Dobell, 38 L. J. Ch. 111; Watts v. Smith, 62 L. T. N. S. 453; Smith v. Hancock, [1894] 1 Ch. 209, 2 Ch. 377; Cade v. Cade, 22 Times L. R. 243.]

I do not pursue the inquiry through the other cases. Those to which I have referred are decisions upon or contain expressions of opinion as to the meaning of the word "engage" which are in accord with the opinion which, apart from authority, I have formed, which is that, as used in the partnership articles, having regard to the nature of the employment of the husband of plaintiff in the business of the partnership, the covenant of plaintiff is wide enough to include the taking by the husband of such a part as, upon the findings of my brother Mabee, the husband took in the business of Burke, and that the acts of the husband therefore constituted a breach of plaintiff's covenant.

I adopt the reasoning of Kekewich, J., in Watts v. Smith, which may, I think, be well applied to the covenant with which we have to deal. Paraphrasing his language, I would say: "In this case I find that provision is made for the engagement of plaintiff's husband in the business of the partnership, and a bargain is made that he shall enter the service of the partnership for a certain time and on certain

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terms. When I come to the terms of the bargain and the consideration that it was for a limited period and a limited distance, that the husband should not engage in a similar business, I think it means that he should not go and do that within those limits which he until then was doing in the employment of the partnership, and that the covenant is sufficiently expressed to render plaintiff liable for a breach of the covenant if her husband is engaged, that is, being occupied at all events, as a manager of it, in a business in Port Arthur, which competes or interferes with the business of the defendant.

For these reasons, I would allow the appeal with costs, reverse the judgment of my brother Mabee, and substitute for it a judgment declaring and adjudging that the acts of the plaintiff's husband of which defendant complains constituted a breach of plaintiff's covenant, directing a reference to inquire into and assess the damages of defendant for that breach, and reserving further directions and the costs of the reference. The defendant should also have the costs of the counterclaim up to and including judgment.

CLUTE, J., gave reasons in writing for the same conclusion.

MAGEE, J., also concurred.

OSLER, J.A. APRIL 9TH, 1907.

C.A.—CHAMBERS.

CRONKHITE v. IMPERIAL BANK OF CANADA.

Appeal to Court of Appeal—Leave to Appeal from Order of Divisional Court—Amount in Dispute—Special Circumstances—Justice of the Case.

Motion by plaintiff for leave to appeal to the Court of Appeal from order of a Divisional Court, ante 326, reversing judgment of ANGLIN, J., at the trial, 8 O. W. R. 18, and dismissing the action, which was brought to recover the value of a vault door placed by defendants upon premises

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sed by them and owned by plaintiff, and afterwards re-
ved when the lease terminated, plaintiff alleging that
had become part of the freehold and was wrongfully re-
ved.

W. E. Middleton, for plaintiff.

A. B. Morine, for defendants.

OSLER, J.A.:—Leave to appeal ought not to be granted.
e value of the matter in controversy is no more than
0, and I cannot see that there are any special reasons
treating the case as an exceptional one so as to warrant
urther appeal under Ontario Judicature Act, sec. 76 (g).
The fact that the Divisional Court differed from the
l Judge does not of itself justify further litigation, and
n not satisfied that the opinion of the former is plausibly
ng, either as to the proper inference of fact as to the
nership of the door of the safe which was the subject of
ute, or as to the continuation under the several leases
the right to remove it, if it was to be regarded strictly
a trade fixture.

The justice of the case, if I may use the expression,
ms to be wholly with the defendants.

The motion is dismissed; costs follow.

RTWRIGHT, MASTER. APRIL 10TH, 1907.

CHAMBERS.

NICHOLSON v. MAHAFFY.

ading—Statement of Claim—Non-conformity with Writ of Summons—Additional Claim Related to Original Claim—Action to Establish Will and Set aside Deed—Claim to Set aside Later Will—Embarrassment—Cross-action.

Motion by defendants for an order striking out part of statement of claim.

Grayson Smith, for defendants.

W. E. Middleton, for plaintiff.

THE MASTER:—This is the action referred to in the gment in Re Hughes, Mahaffy v. Nicholson, ante 506, ought by the defendants in that suit.

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The writ of summons was indorsed with two claims: (1) to have it declared that the will of 25th April, 1903, was the last will of the testator; and (2) that the deed of 28th August, 1905, may be set aside.

The statement of claim amplifies this, but does not ask any other or different relief except that the will of 28th August, 1905, may also be declared invalid. Defendants move to have all reference to this later will struck out, as being contrary to Rules 137 and 288, and being also embarrassing, and as being already the subject of the earlier action between the parties.

It was said in answer to the motion that the statement of claim does not exceed the liberty given by Rule 244. That was under consideration in Muir v. Guinane, 6 O. W. R. 383 and 844. At p. 845 I said of Rule 244: "That Rule does not go further than to forbid the setting up in the statement of claim of an entirely distinct and separate cause of action from any mentioned in the writ; but a further claim may be added, if it has a direct relation to the original claim: see H. & L., 3rd ed., in loc."

An application of this principle shews that the motion must fail. Unless the deed of 28th August, 1905, is set aside, it is conceded that it will be of little advantage to plaintiffs to establish the will of April, 1903. But, as the latter will was executed on the same day as the deed, it must necessarily be set aside if the deed is declared to be invalid. It therefore appears that the prayer to have this later will set aside "has a direct relation to the original claim," and is therefore within the principle of Rule 244.

In any case it cannot be said that defendants will be in any way embarrassed by its introduction into this virtually cross-action. By the order of 5th March both actions are to be tried together, and the whole questions between the parties will be disposed of at the same time.

If defendants think that the statement of claim can be attacked on the ground that the High Court of Justice has no jurisdiction to pass on the earlier will, or that the necessary parties are not before the Court, as was intimated on the argument, these objections can be taken as matters of defence and be disposed of in due course.

The motion is therefore dismissed, with costs in the cause. . . .

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RIDDELL, J. APRIL 10TH, 1907.

CHAMBERS.

CLISDELL v. LOVELL.

Evidence — Motion for Interim Injunction—Examination of Witnesses in Support of—Refusal to Answer Questions—Relevancy—Scope of Inquiry—Motion to Compel Answers —Disposition of.

Motion by plaintiffs to commit defendant Lovell and H. J. Wright and Massey Morris for refusal to answer certain questions upon their examination as witnesses upon a pending motion for an interim injunction.

W. N. Tilley, for plaintiffs.

W. H. Blake, K.C., for defendant Lovell and others.

R. S. Cassels, for defendants Case and the George A. Case Co. Limited.

J. H. Moss, for H. J. Wright.

RIDDELL, J.:—. . . This action was begun on 18th February, 1907, by Clisdell and Orpen as plaintiffs, against Lovell, Case, the George A. Case Co. Limited, Mackenzie, Millar, and the Dominion Brewery Co. Limited, as defendants, for a declaration that Lovell is trustee for each plaintiff for one-eighth interest in the purchase of the Dominion Brewery, an injunction restraining him from selling or incumbering the assets without the consent of plaintiffs, a declaration that each of them is entitled to a one-eighth interest in any shares or other consideration received or to be received by Lovell, Case, the Case Co., or Mackenzie, in respect of the assets, an injunction restraining these defendants from transferring, etc., any such capital stock or other consideration without the consent of plaintiffs, a declaration that Lovell is trustee for plaintiffs and Millar for a one-half interest in the purchase, and that Lovell, Case, the Case Co., and Mackenzie are trustees for plaintiffs and Millar of a one-half interest in any shares or other consideration received or to be received by them or any of them in respect of the assets, for an account of the profits of Lovell, Case, the Case Co., and Mackenzie in respect of the

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purchase, and for payment to plaintiffs and Millar of one-half thereof.

A notice of motion was served, apparently on 2nd March, for an injunction restraining the Dominion Brewery Co. Limited (the company formed by Mackenzie) from selling or incumbering its assets, etc., without the consent of plaintiffs, and restraining defendants Lovell, Case, the Case Co., and Mackenzie from transferring, etc., any shares or consideration received or to be received in respect of the sale of the brewery, until the trial, upon the grounds, amongst others, that the property was purchased by defendant Lovell as trustee for plaintiffs and others, and giving notice that in support of such motion would be read certain affidavits and the evidence of Case, Millar, Lovell, Massey Morris. the incorporating clerks, and H. J. Wright.

In support of this motion an examination was had of the clerks, Case . . . Lovell, and Messrs. Wright, and Morris.

Upon these examinations Lovell, Wright, and Morris declined to answer certain questions, and this motion was made before me in Chambers, in effect to compel answers to such questions, and also to compel Lovell to make certain searches to enable him to answer questions, and for further relief not necessary here to mention.

It is perfectly plain that the question to be tried is whether Mackenzie, when he was effecting a purchase through his nominee Lovell, was acting for himself or as trustee for Case or for Case and the plaintiffs. And no questions need be answered which do not bear upon that inquiry. . . . There is at least a very strong suspicion raised that the whole transaction by Mackenzie was for the benefit of Case, although, as the evidence stands, it may be that a trust has not been made out.

But, while not reflecting upon the course taken in this action, I must say that this whole proceeding seems to be directed toward procuring evidence to be used at the trial. rather than evidence to be used upon the motion for an injunction. This is the more obvious from the fact that when I suggested to the counsel for plaintiffs that he file a statement of claim, or at least hand me in a draft that I might see exactly what he was claiming, he declined and said that he was entitled to all the assistance he could get in these examinations in framing his pleadings.

As matters stand now, the Dominion Co. are the owners of the property, and Mackenzie the owner of the stock—

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and these are the only persons against whom an injunction could at present effectively be granted. While plaintiffs are, in case of necessity, entitled to full discovery of all facts which would shew them entitled to the injunction sought, the Court will not allow an inquisitorial examination into the business or business transactions of any person, unless it be reasonably necessary. There may be difficulty in exactly drawing the line in some cases; but I do not think there will be much, if any, difficulty in this case, if it be found necessary to decide. But Mackenzie is said to be a man of means, and there is no suggestion that the company is not a prosperous one. If defendants will give an undertaking on terms of the injunction sought, I shall enlarge this motion to be brought on before myself at any future time, upon two clear days' notice; if not, I shall give a decision upon the merits. Mackenzie is, I understand, in England—therefore I shall allow defendants 3 weeks to make their election. In the meantime I reserve costs.

MABEE, J. APRIL 10TH, 1907.

CHAMBERS.

McDOUGALL v. McKINNON.

Arrest—Ca. Sa.—Custody of Bail—Discharge—Disclosure of Judgment Debtor's Affairs on Examination—Payments to Preferred Creditors—Indigent Debtor.

Motion for defendant's discharge from custody under a ca. sa.

L. F. Heyd, K.C., for defendant.

Joseph Montgomery, for plaintiffs.

MABEE, J.:—I think, upon the authority of People's Loan and Deposit Co. v. Dale, 18 P. R. 338, the defendant is entitled to the order asked under R. S. O. 1897 ch. 81, sec. 9. He has submitted to an exhaustive examination, which I deem satisfactory; he has accounted for the disposition of the money he had; and it is apparent that he is not worth $20. It is true that he disposed of his small business, and paid about one-half the proceeds to favoured creditors, and has spent the balance in living expenses, but I see in this no reason for his continuance in custody, which, technically speaking, he is, having given bail pursuant to R. S. O.

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1897 ch. 80, sec. 20. He has fully disclosed all his dealings with his property, and given all information asked for, and the fact of his having made preferred payments does not, upon the authority of the Dale case, disentitle him to the order asked for.

The order may go discharging him from custody and for cancellation of the bond. No costs.

RIDDELL, J. APRIL 10TH, 1907.

WEEKLY COURT.

CARTER v. CANADIAN PACIFIC R. W. CO.

Damages—Quantum—Master's Report — Appeal—Absence of Order of Reference—Order Made nunc pro tunc—Timber Cut off Lands of Plaintiff.

Appeal by defendants from report of local Master at Barrie.

C. E. Hewson, K.C., for defendants the Canadian Pacific R. W. Co.

T. F. Battle, Niagara Falls, for defendants Battle, Conlan, and Armstrong.

G. Lynch-Staunton, K.C., for plaintiff.

RIDDELL, J.:—This is an action against the Canadian Pacific Railway Company and their contractors, Battle, Conlan, and Armstrong, for the value of certain timber, etc., cut off lands of plaintiff.

The parties agreed that it should be referred to the Master at Barrie to find the quantity and value of material cut upon and of that cut off the "right of way" of the Canadian Pacific Railway. They also agreed that there might be an appeal from his report. The Master having made his report, an appeal was taken by both defendants, and these appeals were brought on before me. It appeared that no order had been taken out referring the matter to the Master, and, following Re Roaf and Roaf, decided by my Lord the Chief Justice of the King's Bench, I declined to hear the motions. Subsequently, upon consent of all parties, I made an order nunc pro tunc for inquiry and report (as in the consent) under Rule 646; and the appeals were argued on the merits.

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Counsel for defendants the Canadian Pacific Railway ›mpany admitted that he could not successfully attack the ıdings as to the whole amount of material taken or the ice allowed, but he contended that the division of the ıount between the "right of way" and "off the right of ıy" was improper and not warranted by the evidence.

Counsel for the other defendants contended that while e total amount of material might be right, the price was ›ong, and that therefore the sum found as the price "off e right of way" was too much.

I have read the evidence with care, and I agree with unsel for defendants the Canadian Pacific Railway Comıny, that no fault can be found with either the total ıount or the total price. As to the division made by the aster, I invited counsel for the railway company to state hat he thought it should be, but he was not able to state ecisely, contenting himself with arguing that it did not ›pear upon the evidence that the division was right. It is ›parent that the exact amount of each must be a matter judgment, not far removed from guessing; but that is hat happens every day with juries—and with Judges—in xing the amount of damages. I think there is ample evience here to justify a jury or the Master in finding the ıounts as they have been found; and I am unable to arve at any different conclusion as to which I can be certain ıat I am right: Montreal Gas Co. v. St. Laurent, 26 S. C. . 176.

The appeals will both be dismissed with costs to plainff; defendants will have no costs of either appeal.

APRIL 10TH, 1907.

DIVISIONAL COURT.

CUFF v. FRAZEE.

vidence—Deposition of Witness at Former Trial—Proof of Search for Witness and Failure to Find him—Absence of Strict Proof that Witness out of Jurisdiction—Hearsay—Admissibility of Evidence—Rejection at Trial—New Trial —Master and Servant—Injury to Servant and Consequent Death—Evidence of Negligence—Case for Jury.

Appeal by defendants from judgment of ANGLIN, J., in avour of plaintiffs, upon the findings of a jury, and alterna-

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tive motion by defendants for a new trial, upon the ground that the trial Judge erroneously rejected the evidence given by one James Brown at a former trial of the action, when tendered by defendants. The action was brought by the widow and children of a man in the employment of defendants, a cartage and storage company, to recover damages for his death by reason of the negligence of defendants, as alleged.

W. M. Hall, for defendants.

J. M. Godfrey and T. N. Phelan, for plaintiffs.

The judgment of the Court (MEREDITH, C.J., MACMAHON, J., TEETZEL, J.), was delivered by

MEREDITH, C.J.:—James Brown was examined at a former trial as a witness on behalf of defendants. He was not produced as a witness at the last trial, being, as defendants' counsel informed the Court, then out of the jurisdiction, and it was sought to put in evidence his testimony given at the last trial, but my brother Anglin refused to admit it, on the ground that proper proof had not been given that the witness was then out of the jurisdiction.

The testimony which defendants adduced to shew that Brown was then out of the jurisdiction was that of Lorenzo D. Frazee . . . and Oliver Thompson . . .

According to the testimony of Thompson, Brown had called at the place of business of defendants in the spring of 1906, and told Thompson that he was going to the "other side," and that Thompson had not seen him since; and, according to the testimony of Frazee, a couple of weeks before the last trial he had gone for the purpose of procuring the attendance of Brown to the place where he had been stopping before, the address having been given to him by Brown, and that the persons there could not tell what the address of Brown then was, except that he had gone to the States—they thought to Cleveland. There was also some very general evidence that other inquiries had been made by Frazee, within the couple of weeks, to ascertain the address in Cleveland of Brown, and that they had been unsuccessful. . . .

If, in order to the admission of the testimony, it was necessary to prove that Brown was at the time of the trial out of the jurisdiction, the ruling of my brother Anglin

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as, in my opinion, right, because the rule against the admis-
on of hearsay evidence precludes the reception of such
stimony as that by which it was sought to establish the
ct. . . .

[Reference to Taylor on Evidence, 10th ed., sec. 472,
ote 5, p. 359; Robinson v. Markis, 2 M. & Rob. 375; Doe v.
owell, 7 C. & P. 617.]

The right of defendants to put in evidence the testi-
ony of Brown does not depend upon the statute 1 Wm.
V. ch. 22, sec. 10, or upon any similar enactment, but upon
e recognized rule as to the reception of secondary evidence
f oral testimony referred to in the following passage from
aylor on Evidence, sec. 464: "The broad proposition as to
is is . . . that such proof is only admissible where
e production of primary evidence is out of the party's
ower, and, subject to this, it may be stated as a general
le that where a witness has given oral testimony under
ath in a judicial proceeding in which the adverse litigant
as the power to cross-examine, the testimony so given
ill, if the witness himself be incapable of being called,
e admitted in any subsequent suit between the same
arties, or those claiming under them, if such suit relate
the same subject, or substantially involve the same ma-
rial questions." This rule applies a fortiori where the
idence taken at the first trial is offered on the second trial
f the same action.

Apart from authority, it appears to me that where the
arty offering the testimony shews that after diligent search
e witness cannot be found, the witness is incapable of be-
g called, within the meaning of the rule. . . .

[Reference to Anon., Godbolt 326 (case 418.)]

If I am right in this view, the answers to the inquiries
ade by Frazee were admissible to prove the unsuccessful
arch for the witness and the inability of the defendants
find him, and for that purpose are not to be treated as
earsay evidence.

The cases upon this latter point are numerous, and have
risen where the absent witness was the subscribing witness
an instrument the execution of which was required to be
roved, and the party upon whom the onus of proof lay
ought to account for not calling him. Most of the cases are
ited in Roscoe's Nisi Prius, 17th ed., pp. 133-4, and it is

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not necessary, having read them, that I should say more than that they bear out the statement of the text-writer.

The criminal cases in which it has been held that it is no ground for receiving in evidence a deposition taken before the committing magistrate, that the witness is a foreigner and absent in a foreign country, have no application, for the rule which defendants invoke does not apply in criminal cases: see Regina v. Austen, 7 Cox C.C. 55.

The provisions of the Criminal Code, R. S. C. 1906 ch. 146, sec. 199, do not provide for the case of a witness who cannot be found, but the absence of such a provision does not make against the view I take, for it may well be that Parliament did not deem it wise that in criminal cases inability to find the witness should be a ground for admitting his evidence.

The observations of the Chief Justice of Ontario in Monro v. Toronto R. W. Co., 9 O. L. R. 299, 312, 4 O. W. R. 392, were referred to in support of plaintiff's contention that the testimony of Brown was rightly rejected . . . "Unless by consent, or on proof of the death or absence from the jurisdiction and consequent inability to procure his attendance at the trial, the depositions of a witness taken at the former trial could not be received." But it is plain that the Chief Justice was there pointing out in general terms the nature of the rule applicable to the case he was considering, and was not called upon and did not attempt to give an exhaustive statement of the cases in which the depositions taken at a former trial might be read.

Had my brother Anglin's refusal to receive the deposition of Brown as evidence proceeded upon the ground that he was not satisfied that it appeared that, after diligent inquiry and search, Brown could not be found, I should not have felt justified in interfering with his ruling, but, as that view of the case was not considered by my learned brother, we have to deal with it upon the proof given by defendants, and, after consideration of that proof, I have reached the conclusion that it was sufficient that, after diligent inquiry, Brown could not be found, to entitle defendants to read his testimony given at the last trial.

Although counsel for defendants, as I gather from the transcript of the evidence, did not rest his claim for the admission of Brown's testimony upon the ground that, after diligent search, the witness could not be found, counsel's failure to put forward that ground in argument ought not,

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I think, to preclude defendants from now relying upon it. There is no reason for suspecting that defendants were acting in bad faith or that they did not really desire to procure the attendance of Brown at the second trial.

The spirit of recent legislation in this province as to the mode of proving the fact on the existence of which depends the right to adduce the evidence of an absent witness, is liberal and in the direction of facilitating the means of proof. In this spirit, Rule 512 provides that the testimony taken under commission may be read "without any other proof of the absence from Ontario of the witness therein named than an affidavit of the solicitor or agent of the party as to his belief of such absence."

We ought, I think, to deal with the application of defendants to admit the evidence of Brown in the same liberal spirit.

A new trial must, therefore, be directed, unless defendants' counsel is right in his contention that plaintiffs failed to make out a case to go to the jury, for in that case the action should be dismissed.

After having carefully perused the evidence, I am of opinion that there was sufficient evidence to go to the jury. There was evidence for the jury that (apart from the alleged rule forbidding it) deceased was properly upon the seat of the waggon when it was being backed under the shed, and that the shed was so constructed that backing in was attended with danger to those who sat upon the seat of it—I say nothing, of course, as to the weight of the evidence—and as to the main ground relied upon, the existence of a rule against persons doing the work the deceased was employed to do, sitting upon the seat of the waggon, it is impossible to say that the existence of the rule was proved by practically uncontradicted evidence, and, if it was not, my brother Anglin could not properly have withdrawn the case from the jury.

The result is that, in my opinion, the judgment appealed from must be set aside and a new trial ordered, and I would make the costs of the last trial and of the appeal costs in the cause, unless otherwise ordered by the Judge before whom the action is again tried.

The necessity for sending the case down for a third trial is to be deplored, and I venture to hope that a third trial

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may be avoided by the parties getting together and effecting a settlement which will put an end to the long and very costly litigation in which they are engaged.

APRIL 10TH, 1907.

DIVISIONAL COURT.

GALLAGHER v. CITY OF TORONTO.

Municipal Corporations—Sewer — Insufficiency—Injury to Property—Liability—Costs.

Appeal by plaintiff from judgment of MABEE, J., ante 310, dismissing the action without costs.

H. T. Beck, for plaintiff.

H. L. Drayton, for defendants.

THE COURT (MEREDITH, C.J., MACMAHON, J., TEETZEL, J.), dismissed the appeal with costs.

RIDDELL, J. APRIL 11TH, 1907.

TRIAL.

RUETSCH v. SPRY.

Easement — Severance of Tenement—Conveyance of Dwelling-house—Implied Right to Access of Light and Air—Interference with by Grantor—Erection of Fence—Derogation from Grant—Right to Flow of Water from Premises Conveyed—Interference with, by Fence—Injunction—Damages.

Action for an injunction to restrain defendant from maintaining a fence upon his premises in such a position as to interfere with the access of light and air to the plaintiff's house adjoining and to interfere with the escape of water and melted snow and ice from plaintiff's premises, and for damages for injury done by the erection of the fence.

D. O'Connell, Peterborough, and G. N. Gordon, Peterborough, for plaintiff.

G. Edmison, K.C., for defendant.

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RIDDELL, J.:—Defendant for more than 50 years was the owner of a lot in Peterborough; at the time of his acquiring the property there was a house at the south-east corner, in which he afterwards lived for about 20 years himself, putting a small addition thereto; but otherwise the house is the same now as when he bought, the main part of the house being more than 60 years old, and the addition more than 40, a part perhaps having been more recently built. The house in part and the addition chiefly were lighted from the west, the windows now existing being of the same size and in the same position as they always have been.

There were and are now no other buildings upon the lot near, all the lot west of the house being vacant land.

In May, 1903, defendant made a conveyance to plaintiff of a part of the lot, including part of that upon which the house was built. The grant is made in pursuance of the Act respecting Short Forms of Conveyance. A dispute having arisen as to the land conveyed, an action was brought by the present plaintiff against the present defendant in which it was alleged by the plaintiff that it was the intention to convey "the dwelling house, kitchen and shed, and other buildings, premises, and appurtenances thereto belonging;" that the deed did not cover all the land; and plaintiff asked for a rectification of the deed accordingly, adding a prayer for general relief. Defendant pleaded that the conveyance correctly set out the land sold. This action was tried by my brother Anglin at Toronto in April, 1906, and he found in favour of plaintiff, declaring the land conveyed by the deed to be bounded on the west by a line running vertically under the outer margin of the eave of the building from the north-west corner of the house southerly for a distance not material to be set out, and then in this straight line produced southerly. By reason of the fact that the orientation of the house is not the same as that of the lot, but at a certain point the west side of the house leans to the east, this western line, so defined by the Court, is at the south end of the house somewhat further from the building than at the north end. This line is distant from the wall of the building at the north about 8 inches, at the south about 2 feet, the outer margin of the eave of the building, as I have said, running vertically above the line for a certain distance, and then trending towards the east.

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Defendant in October, 1906, began to build a fence along this line, taking care that the posts, about 6 inches in diameter, which he set, should have their eastern side just at but not beyond the boundary declared by the Court, and, as he put the boards constituting the fence on the south side of the posts, the whole of the fence was upon his own land. He was written to by plaintiff's solicitor as to the effect such a fence would have on plaintiff's property, and warned that an action would be brought. The fence which he was putting up was a close board fence some 7 feet in height, and it was pointed out to him that a picket fence would be less expensive and would produce little or no difficulty. Apparently before he had begun to build the fence and while he was preparing to do so, he had been written by the solicitor such a warning of the result of his proposed fence, but neither to this letter, nor to that referred to above, nor to a letter written afterwards asking him to remove the fence, was there any attention paid.

The house in question is a log house, clapboarded over, and the additions are clapboarded, the latter being, it is said, about 6 feet high. The whole dwelling is an humble one, with the windows in the addition not more than 18 inches from the ground. The effect of the high close fence upon such a residence may well be imagined, coming as it does within about a foot of the addition and varying from one foot to 2½ feet from the original house. The light is cut off, the air is excluded, and ventilation impaired; the snow direct from the heavens and ice and snow from the roof fall down in the narrow lane between wall and fence, melt and run into the building; it is impossible to get in through the narrow space (the fence posts coming within 8 inches of the wall in places) in order to clear away the snow and ice; in short, whether, as is alleged in the correspondence and not denied, the fence was built as it is to retaliate upon plaintiff for his bringing the former action, this is a choice instance, a typical specimen, of that variety of fence commonly known as "spite fence."

This action was brought for damages and an injunction, and tried before me. . . . . I found as a fact that the fence produced "a substantial privation of light, enough to render the occupation of the house uncomfortable according to the ordinary notions of mankind," and that the fence was a nuisance. See Colls v. Home, [1904] A. C. 179; Higgins v. Betts, [1905] 2 Ch. 210. I also find

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that the deprivation of air by the fence is of a substantial character and enough to render the house uncomfortable according to the ordinary notions of mankind, and so also the effect of the fence by keeping in the accumulated mass of snow and ice and the water produced by the thawing of these. There is no real dispute as to the facts, but the law applicable is strenuously contested.

The claim of plaintiff is briefly this: I bought the land, including the house with all its appurtenances; at the time I bought, the house had the full benefit of light and air from the west, and also the benefit of an outlet for snow and ice and water, so that these would not pile up against the house and do damage by the water making its way in through the windows and otherwise; an easement passed by the deed; and, if not, defendant cannot derogate from his own deed.

Defendant contends:—

(1) The deed of 1903 is plain, and there was no grant of anything but the very land mentioned therein, as admittedly there was no parol agreement or any agreement outside of the conveyance, if indeed that could make a difference.

(2) If there was any doubt before, there is none since the judgment of the Court in the former action, in which the rights of the parties were declared.

(3) That being so, defendant is at liberty to do as he pleases upon his own property.

(4) The fact that the fence may have been or was placed from a motive to do injury to plaintiff is immaterial.

As to the last point urged by defendant, I agree with him. "No use of property which would be legal if due to a proper motive can become illegal because it is prompted by a motive that is improper or even malicious:" Mayor, &c., of Bradford v. Pickles, [1895] A. C. 587. . . . By the law of England no action will lie at the instance of a neighbour for an act done by one on his own land unless such act be attended with offence or injury to the legal rights of such neighbour—and improper or malicious intent or motive is immaterial.

The second ground taken by defendant is untenable. The whole question in dispute in the former action between the parties was the location on the ground of the land conveyed or intended to be conveyed by the deed.

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As to the first and third grounds, the effect of the deed is to entitle the grantee to the quiet possession of the lands "with their and every of their appurtenances;" and the word "appurtenances" will not cover these quasi-easements which have never existed or which have ceased to exist as easements properly so-called, by reason of unity of ownership: see per Harrison, C.J., in Harris v. Smith, 40 U. C. R. 33, 39; Goddard on Easements, 3rd ed., pp. 131, 132; cf. Gale on Easements, 7th ed., p. 78; Tudor's L. C. R. P., 3rd ed., p. 170: although the question does not seem to be free from doubt and difficulty. So that if plaintiff was relying simply upon the wording of his deed, as interpreted by the statute, he might fail.

But the other ground upon which he relies is, I think inexpugnable. Since ever the question was raised in England it has been held that "where the owner of two tenements sells one, a grant will be implied of those continuous and apparent easements which during the unity of possession were enjoyed under the title of ownership. For instance, where the same person possesses a house, having the actual use and enjoyment of certain lights, and, also possessing the adjoining land, sells the house to another person . . . he cannot . . . build upon the adjoining land so as to obstruct or interrupt the enjoyment of those lights. The reason is founded on the rule that a man cannot derogate from his own grant, for it would be manifestly unjust, when a person had purchased the house, having the apparent and continuous enjoyment of the lights, that he should be deprived of this by the act of the person from whom he purchased:" Tudor's L. C. R. P., 3rd ed., p. 173. And the same rule will apply as to air as to light: Keek v. Pearson, L. R. 6 Ch. 809, per Mellish, L.J., at p. 813; such right not being different from that which might be gained under the statute: cf. Gale on Easements, 7th ed., pp. 100, 109.

But there is a distinction between easements which are continuous and easements which are used from time to time only. "There is a distinction between easements such as a right of way, or easements used from time to time, and easements of necessity or continuous easements. The cases recognize this distinction, and it is clear law that upon a severance of tenements, easements used as of necessity, or in their nature continuous, will pass by implication of law, without any words of grant: but with regard to easements which are used from time to time only, they do not pass

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unless the owner by appropriate language shews an intention that they should pass:" Polden v. Bastard, L. R. 1 Q. B 156, at p. 161, per Erle, C.J., cited with approval by Mellish, L.J., in Watts v. Kelson, L. R. 6 Ch. at p. 173. .

As regards the light and air I had no difficulty, and at the trial so expressed myself. Mr. O'Connell, however, urges that it would not be sufficient to cut down the fence to within 18 inches of the ground, but that plaintiff is entitled to have a surface exit for the snow and water from the heavens direct and from the roof. That raises a question which, so far as I can find, has not been decided. If the water falling either in liquid or crystalline form from the roof had been accustomed to be carried away by a drain or in some defined channel, no doubt that would establish an easement which would pass by implication: Pyer v. Carter, 1 H. & N. 916. And again, if it were a case of determining the naked rights of one neighbour to discharge surface water upon the lands of another jure naturæ, plaintiff must fail: Darby v. Crowland, 38 U. C. R. 338, 343; Williams v. Richards, 23 O. R. 651. . . .

[Reference to and quotations from Rawstron v. Taylor, 11 Ex. 369.]

This case seems to be authority for the converse of what is under discussion; and it seems to me that if the right to the flow of surface water to the granted property does not pass by implication, neither does the right to the flow of surface water from the granted premises—speaking in the abstract.

But, if the damming back of the surface water would have the effect of interfering with the reasonable enjoyment of the property granted, this is a violation of the rights of the grantee. The grantor cannot be permitted to do any act which, e.g., would cause the land granted to be or become a mere water table (to use the expression of Platt, B., in Rawstron v. Taylor, at p. 383), or a morass. See Angell on Watercourses, 6th ed., sec. 166a.

It is, to my mind, clear that the reasonable enjoyment of the premises sold includes the comfortable enjoyment of them: and that, in the circumstances of this case and the condition of the house, involves the non-prevention of the natural flow of the water, etc., from the side of the house. Whether this fence interferes with the reasonable enjoyment of the remainder of the lot, does not appear. If the whole fence be removed, there will be no necessity of

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determining that matter; if not, the matter may require to be determined on a motion to commit for breach of the injunction to be ordered.

There will be an injunction restraining defendant from continuing the fence erected by him in such a way as to interfere with the comfortable and reasonable enjoyment of the premises conveyed; an order that he forthwith remove the same, or so much thereof as interferes with such enjoyment; defendant will pay the costs of the action on the High Court scale, including the costs of examination and all interlocutory costs which I have the power to dispose of. At the trial I awarded $5 for damages for the deprivation of light and air. I add to that $20 for damages till the trial caused, through the wrongful act of defendant, by snow and ice; defendant will pay $25 in all as damages. I do not grant a stay.

It is to be hoped for his own sake that defendant will remove the fence entirely and not run the risk of its being found that such part of the fence he may think he is at liberty to leave standing, and so does leave standing, does in fact interfere with the reasonable enjoyment by plaintiff of the property conveyed.

RIDDELL, J. APRIL 11TH, 1907.

TRIAL.

WATKINS v. TORONTO R. W. CO.

Street Railways—Injury to Person Attempting to Get on Car and Consequent Death—Negligence—Findings of Jury—Contributory Negligence—Ultimate Negligence—Dismissal of Action.

Action by the father of William E. Watkins, a lad of 15, who lost his life in October, 1906, by reason of the negligence of defendants, as alleged, to recover damages for the death, plaintiff suing as administrator of the estate of the deceased and under the Fatal Accidents Act.

John MacGregor and E. A. Forster, for plaintiff.

D. L. McCarthy, for defendants.

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RIDDELL, J.:—At the trial it was established, and indeed as made a part of the case by both parties, that a car f defendants coming west on King street had stopped at e east side of Sumach street, which runs at right angles King street. Apparently the lad ran up the east side of umach street, then turning to the left towards the west de of Sumach street, ran across King street in front of e car. He then went east on the north side of the north r track on King street, and attempted to get on the car. the attempt to get on, he fell or was thrown, and by me means his body got under the car. The wheels did not n over his body, but pushed him along on the rails, Cowng, a witness for plaintiff at the trial, for part of the time ragging him along by the leg. The car was stopped, and was found that the boy had received wounds of a painful ut not necessarily dangerous character. Unfortunately, owever, infection took place, it is supposed through these ounds, or some or one of them; tetanus set in, and the oy died. . . .

There were a number of charges of negligence against efendants, but, after the evidence of the engineer called y plaintiff, the whole contest was reduced to a simple disute. Cowling swore that the boy took down his umbrella s he was crossing in front of the car; that the car was then tanding; that the car was still standing after the boy put is feet on the steps and tried to get on; that then the ar gave a quick jerk as the boy was in the act of trying to et on; and that this threw him down. On the other hand, he great mass of evidence was to the effect that the car as moving when the boy ran in front of it, and that it was noving still faster when the boy tried to get on.

There was no pretence that anything could have been one by defendants after the attempt of the lad to get on hich would or could have prevented the accident—the ase of plaintiff being that the motorman was not keeping look-out; that he did not see the lad taking down his umrella or trying to get on the car; that, the car standing till as has been said, the motorman gave a quick jerk to the ar, and so the accident happened.

I asked the jury whether the casualty was a mere accident or due to negligence, and, if due to negligence, the negligence of whom, and what such negligence was, warning them at the same time that they must set out every act of negligence which caused or assisted in causing the casu-

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alty, as they would be held to negative all negligence except what they expressly found.

The jury found that the death was due to the negligence of both the boy and defendants—of the boy in attempting to get on the car while in motion, and of defendants in that the motorman turned on power too quickly on wet rails and did not keep a proper look-out. They also found specifically that the car was in motion when the lad tried to get on. As to the finding of negligence on the part of the company, there was no evidence as to how the motorman put on the power or that he put it on too quickly. The jury seem to have got this idea from a rule of defendants read to them by counsel for plaintiff. Then as to the look-out, the contention of plaintiff was that the motorman did not see the signal to stop (taking down the umbrella); that he should have done so; and that he should have stopped the car, if it were moving, and allowed the lad to get on, or, if the car were stopped, he should not have started till the lad did get on.

I do not find any duty imposed on defendants by the Act of 1892 to stop at any point except the near side of cross streets; and they are expressly forbidden to stop opposite cross streets. There does not seem to be any duty cast upon defendants, their car moving as this was, to stop for passengers at least at the point where the car was.

However that may be, the negligence found by the jury of the lad was concurrent and contributory, continuing as it did up to the very latest time at which it can be contended that there was any effective negligence of defendants; there could be no ultimate negligence on the part of defendants, in the sense in which the words are used in Maycock v. Wabash R. R. Co., ante 546. The negligence of the lad continued up to the moment in which he actually tried to take hold of and to get upon the car; and there is no pretence that anything the motorman could do then or thereafter would have prevented the accident. It was for this reason that I did not put the usual question: "Notwithstanding the negligence of the lad, could defendants by the exercise of ordinary care have avoided the accident, and, if so, how?"

What the jury meant, no doubt, was, as urged upon them by plaintiff, that the motorman did not see the "signal" as the boy was crossing in front of him; that, if he had done

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, he would have stopped the car and allowed the boy to t on, but, as he did not see him, he did not stop.

Notwithstanding the able argument of plaintiff's counsel, cannot disregard the findings of the jury. The action will dismissed with costs.

ACMAHON, J. APRIL 11TH, 1907.

TRIAL.

JONES v. SHORTREED.

ortgage—Second Mortgagee of Part of Land Covered by First Mortgage — Redemption — Right to Assignment of First Mortgage—Dower—Will—Election.

Action by a second mortgagee for leave to redeem the signee of the first mortgage and to compel an assignment ereof.

H. H. Strathy, K.C., for plaintiff.

A. E. H. Creswicke, Barrie, for defendant.

MACMAHON, J.:—On 1st August, 1899, the late Bartley Racher and the plaintiff, his then wife, for the purpose barring her dower, executed a mortgage to the Huron d Erie Loan and Savings Society for $1,500 and interest, vering the west half of lot 23 in the 5th concession of the wnship of Medonte . . . containing 100 acres.

There is a provision in the mortgage whereby "the ortgagees may from time to time release portions of the id lands, either for or without consideration therefor, thout thereby releasing the remainder of said lands or y of the covenants or things contained therein." This ght may be exercised by the assignees of the mortgagees.

On 27th September, 1900, Bartley D. Racher, in consid-ation of $1,900, conveyed to Wilbur Russell Daniels and harles Herbert Daniels the said west half of lot 23, except e 15 acres off the north-west corner hereof . . . "sub-ct to the mortgage to the Huron and Erie Loan and Sav-gs Society, the amount of which said mortgage is to be educted from the consideration of $1,900 mentioned in

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said deed," which the grantees covenanted to pay. On the same day . . . W. R. Daniels and C. H. Daniels executed a mortgage on the 85 acres so conveyed to them in favour of Bartley D. Racher for $350.

Bartley D. Racher died on 13th October, 1903, having by his will, dated 30th May, 1903, bequeathed to his wife (plaintiff) all his personal property. . . . He also bequeathed to his wife the mortgage for $350 given by the Russells on the south-west 85 acres, and he devised to her the north-west 15 acres . . . "for her sole and only use and benefit while she lives and remains unmarried, and when she dies or becomes again married to be given to my son Sidney Racher, on condition. . . ."

The two Daniels on 9th February, 1906, gave a mortgage to Enoch McKeown to secure $290, covering the 85 acres, which mortgage McKeown assigned to plaintiff on 11th May, 1906.

Sidney Racher had reached his majority before the death of his father.

Plaintiff married her present husband, George Jones, on 6th March, 1906.

Sidney Racher received from the Huron and Erie Loan and Savings Society a notice, dated 23rd May, 1906, demanding payment of the overdue interest upon their mortgage, and stating that, unless paid, proceedings would be taken to sell; and, in consequence of this he on 7th August wrote to defendant stating that if defendant would procure an assignment to himself of the Huron and Erie mortgage and would proceed to foreclose the same on the 85 acres, he (Sidney) "will pay you, in addition to the amount you disburse for said assignment, and interest thereon at 6 per cent. per annum, and all costs that you may be put to, the sum of $100, my object being to get the 15 acres devised to me by my father . . . free from said mortgage and to make the remaining 85 acres satisfy the said mortgage."

The loan company assigned the Racher mortgage to defendant on 20th August, 1906, the consideration therefor being $1,540. Defendant gave notice to all the persons interested of his intention to exercise the power of sale in the mortgage unless payment of the amount due thereon was made within 10 days. The sale was advertised to take place on 20th October, 1906, and on the 19th Mr. Boys, the solicitor for plaintiff, notified Mr. Hewson, the solicitor for defendant, that plaintiff, as second mortgagee, was ready and

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willing to pay the amount due for principal and interest on the first mortgage, but she insisted on getting an assignment of the mortgage to herself. Mr. Hewson told Mr. Boys that the plaintiff was not entitled to an assignment, as she was only a second mortgagee of part of the lands, and that his firm . . . were acting as solicitors not only for defendant, but also for the person who owned the 15 acres, the name of the owner not being disclosed. Mr. Hewson offered to give a discharge or an assignment of the debt covering the 85 acres, with the 15 acres freed from the mortgage, which Mr. Boys refused to accept.

This action was begun on 24th October, 1906, and a few days after the issue of the writ of summons Mr. Boys and Mr. Hewson . . . met . . . when Hewson stated that defendant was a trustee for the owner of the 15 acres.

Plaintiff's rights as second mortgagee are confined to the 85 acres covered by the mortgage given by W. R. Daniels and C. H. Daniels, which was bequeathed to her, and to the McKeown mortgage, also covering the 85 acres, assigned to her; and defendant could at any time have obtained a discharge of the 15 acres under the covenant in the mortgage to the loan company.

It is, I consider, clear that plaintiff is not entitled to a reconveyance of the 100 acres, and if not entitled to a reconveyance, neither is she entitled to an assignment of the mortgage covering the whole. Plaintiff, of course, had notice of the claim of Sidney Racher.

The case is concluded by Leitch v. Leitch, 2 O. L. R. 33, and the authorities there cited.

I have not considered plaintiff's right as dowress to an assignment, as I think the design of the testator, as evidenced by his will, was to give the 15 acres to his son Sidney free from dower. Mr. Strathy, while admitting that this may have been the intention, contended that plaintiff had not made an election to take the bequests under the will as against her right to dower. She accepted the Daniels mortgage, and set up her rights thereunder as second mortgagee to maintain the present action, and received the insurance on her husband's life and sold the horses, cows, waggons, and other chattels on the farm, which, I consider, was a clear election to take under the will.

Plaintiff's solicitor considered that the statement made by Mr. Hewson that his firm was acting for the owner of the 15 acres did not indicate that defendant was not the

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owner thereof, and it was contended that, had explicit information been furnished as to the person who claimed to own the 15 acres, this action might not have been brought, and therefore plaintiff should be relieved from payment of costs. Plaintiff was claiming under the will of her husband, and a reference to that would have snewn who was entitled to the 15 acres; and, as the writ was issued on 24th October, 1906, and the statement of claim not served until 22nd March, 1907, there was ample time in which to obtain full information before filing the claim.

Action dismissed with costs.

CARTWRIGHT, MASTER. APRIL 12TH, 1907.

CHAMBERS.

PARRY SOUND LUMBER CO. v. FLANNER.

Discovery—Production of Documents—Books of Plaintiffs—Postponement of Discovery till Counterclaim Established.

Motion by defendants for further production by plaintiffs.

H. E. Rose, for defendants.

D. L. McCarthy, for plaintiffs.

THE MASTER:—In November, 1905, plaintiffs agreed to sell to defendants, at certain prices, their "total cut for the then next season."

After this contract had been made, plaintiffs leased another mill. Defendants by their counterclaim assert their right to the lumber cut at this after-acquired mill. This right is denied by plaintiffs. Defendants wish to examine plaintiffs' books to see what lumber was sawn at this mill, and at what price it was sold.

It is objected that this is premature.

The question is discussed in Bedell v. Ryckman, 5 O. L. R. 670, 2 O. W. R. 86, 148, 280, where the authorities are collected and reviewed. For the reasons there given, I think the motion fails; and that defendants are not entitled to this information until their right to the output of the

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mill in question has been established. The inspection of plaintiffs' books will not throw any light on this point; and plaintiffs should not be obliged to disclose their business matters until defendants have a decision in their favour.

The costs of the motion will be to plaintiffs in the cause.

RIDDELL, J. APRIL 12TH, 1907.

CHAMBERS.

NORTHERN IRON AND STEEL CO. v. SOLWAY & COHEN.

Discovery — Examination of Officer of Plaintiff Company — Relevancy of Questions—Scope of Examination—Contract —Financial Standing of Company.

Appeal by defendants from order of Master in Chambers, ante 597, in so far as it denied to defendants certain discovery sought upon the examination by defendants of the president and general manager of plaintiffs.

McGregor Young, for defendants.

N. B. Gash, for plaintiffs.

RIDDELL, J.:—. . . Plaintiffs alleged that a contract was entered into between them and defendants for the sale and delivery by defendants to them of 2,000 tons of scrap iron at prices named; that defendants delivered some 350 tons, and refused to deliver the balance; plaintiffs claimed $3,500 damages.

The statement of defence denies the contract to sell and deliver 2,000 tons, and alleges: (1) that the real contract was for a quantity stored at plaintiffs' works at Collingwood and about 200 tons more; (2) that, if plaintiffs understood the contract was for 2,000 tons, the parties were not ad idem; and (3) that the contract was induced by the fraud of plaintiffs in representing that they were able to pay for the iron as each shipment or instalment was delivered, when, as a fact, to their knowledge, they were unable to do so. This last is somewhat inartistically drawn, but, with the assistance of defendants' counsel, I am able so to read the state-

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ment of defence. It is also set out that plaintiffs agreed to pay for each and every shipment or instalment of the iron as it was delivered, and that plaintiffs failed to pay for the last instalment, and were unable to do so.

Upon the examination for discovery of John A. Currie, an officer of plaintiffs, he refused to answer all questions relating to the financial position of plaintiffs and their ability to pay for the iron. There was considerable cross-firing between counsel and witness, but in the result the witness refused to give any information as to the financial standing of plaintiffs when the contract was entered into, though he says they could at that time pay cash. The witness thought it time enough for defendants to raise any question on that contract as to the ability of plaintiffs to pay when they were in default in any payment. The examiner ruled sustaining the objection of the witness to answer. The witness further refused to answer all questions relating to the assets and liabilities of plaintiffs at the time of the delivery of the last instalment, and at the present time, contending that the financial position of the company is irrelevant, and asserting the ability of plaintiffs to pay for the last shipment. These are not specifically ruled upon by the examiner, but I understand the examiner to have ruled that no questions relating to the assets and liabilities—the financial position—of plaintiffs, need be answered. It would have been much better and more regular had the questions been put categorically, followed by a categorical refusal to answer and a clear ruling. But sufficient appears from the examination and the argument before me to shew what the real contentions of the parties are in respect to the examination.

Plaintiffs contend that no inquiry can be prosecuted into their financial standing at any time, that such an inquiry is irrelevant; defendants assert that the condition of plaintiffs at the time the contract was entered into is material, in view of the alleged representation of their financial condition at that time; at the time of the last delivery, as evidence of their previous condition; and at the present time, to justify them in refusing to deliver unless for cash.

A motion was made before the Master in Chambers for an order compelling the witness to answer the questions. The Master refused to make the order as regards the matter in controversy in this appeal. . . .

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I entirely assent to Mr. Gash's argument that only where the evidence is material will the Court allow an examination into the business affairs or transactions of any person or corporation, and would follow Bentley v. Murphy, 2 O. L. R. 665. The question then is, is there really an issue upon which the financial standing of plaintiffs would have a material bearing?

As to the financial standing at the present time, I think not. The knowledge that plaintiffs are now insolvent, no doubt, might enable defendants to guide their course and demand cash on delivery in the future (see Gunn v. Bolckow, Vaughan, & Co., L. R. 10 Ch. at p. 501), or refuse delivery. But that is not a question here. The question is as to the financial standing at the time the contract was entered into. And the same remarks apply to their condition at the time of the last delivery. I do not think it is open to defendants to inquire into this so as to acquire facts upon which to argue that the financial position at an earlier date must have been bad—at least if an inquiry is permitted into the condition at such earlier date. But as to the financial condition at the time the contract was entered into the case is different.

"A man buying is not bound to tell all his affairs to those with whom he deals, though he must not say anything which amounts to a misrepresentation:" James, L.J., in Ex p. Whittaker, L. R. 10 Ch. 446, at p. 449.

"It is true, indeed, that a party must not make any misrepresentation, express or implied:" Mellish, L.J., S. C., p. 449.

A contract induced by a material misrepresentation may be rescinded, and surely a misrepresentation of the financial standing of the purchaser is a most material misrepresentation. I think, therefore, that the questions relating to the financial standing of plaintiffs at the time of the contract must be answered, but that while the standing at the later dates might be evidence to shew that he who misrepresented the standing at the earlier date did so with knowledge, still, as such knowledge does not seem to be material, and as the standing at these dates is not in issue, no disclosure need be made as to the standing at these dates: In re Reese River Silver Mining Co., L. R. 2 Ch. 604; Redgrave v. Hurd, 20 Ch. D. 1. But this inquiry must be jealously guarded. If I could direct the issue to be tried first whether such a misrepresentation was actually and in fact made, I should do so

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—but such a course would be most inconvenient and almost impracticable. I can, however, and I do direct that, before any inquiry be made as intended, defendants file an affidavit of the person who on behalf of defendants entered into the contract, setting out the representations that were made—a copy of this affidavit to be served upon plaintiffs.

The appeal will be allowed in part. Costs in the cause.

MABEE, J. APRIL 12TH, 1907.

CHAMBERS.

RE KAY AND WHITE SILVER CO.

Land Titles Act—Registration of Cautions—Claims for Compensation—Bona Fides—Terminating Cautions.

Appeal by the White Silver Company from an order of the Master of Titles at North Bay allowing two cautions registered by the respondent to stand for 14 days, and directing that, if evidence of the commencement of an action should be filed within that time, the cautions should stand until the action should be decided.

J. Shilton, for appellants.

W. H. Blake, K.C., for respondent.

MABEE, J.:—The Master thought the respondent was "morally entitled to compensation," but I fear the question is whether he had, under the circumstances disclosed, the legal right to tie up the lands in question. It is, of course, obvious that nothing should be said that may in any way prejudice the rights of the parties in the litigation that may follow, or may seem to prejudge the questions involved, and for that reason I refrain from either reciting the facts or expressing any opinion upon them.

Sections 75 and 85 of the Land Titles Act, R. S. O. 1897 ch. 138, confer certain rights upon persons interested or claiming to be interested in lands, and, although I have gone over all the evidence taken before the Master, as well as the correspondence filed, I am unable to bring my mind to the conclusion that the respondent has brought himself within these sections. It was, of course, properly contended for the respondent that the Master was not to try out the rights

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of the parties, but merely to satisfy himself that a bona fide claim had been sworn to for the purpose of registration, such as the Act calls for; but, while this is so, I think any claim the respondent may have is not such that it entitles him to file these cautions, and it will be observed that in this I am not overruling any expressed views of the Master.

I think the appellants were entitled to an order terminating the cautions under Rule 22, sec. 3, in the schedule to the Act, and that such order should now be made.

The appeal must be allowed with costs of the appellants' proceedings.

MABEE, J. APRIL 12TH, 1907.

WEEKLY COURT.

OUELLETTE v. REAUME.

Costs—Judgment on Further Directions — Amount in Controversy—Judgment for Plaintiff with Costs—Refusal to Give Direction as to Scale of Costs.

Motion by plaintiff for judgment on further directions and for costs.

J. E. Jones, for plaintiff.

F. E. Hodgins, K.C., for defendant.

MABEE, J.:—It is not disputed that the plaintiff is entitled to recover from defendant the $225 found in his favour at the trial and the $104.50 agreed upon by counsel as the sum that should be paid by defendant to plaintiff in full of plaintiff's claim that was referred to the Master. It is said that these sums have been paid to plaintiff, and nothing remains but to dispose of the costs of the action and reference, if any costs were incurred in connection with the latter. The trial Judge made no order as to costs down to the trial, and it was contended before me for plaintiff that he was entitled to costs upon the High Court scale. On the other hand, defendant argued that costs upon the County Court scale only were taxable to plaintiff, with the usual set-off to defendant.

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There is nothing before me upon which I could exercise any discretion, even if entitled so to do, to prevent the ordinary practice of the Court applying as to the costs of this action. I have spoken to the Chief Justice of the King's Bench, who tried the action, and he is of the opinion that the usual rule as to costs should be left to apply. I am not called upon at this stage to say how the costs should be taxed—that is for the proper officer. An order may go granting the costs of the action and reference (if any) as well as of this motion to plaintiff. If the taxing officer errs, of course either party has redress.

APRIL 12TH, 1907.

DIVISIONAL COURT.

DART v. QUAID.

Promissory Note—Action on—Holder in Due Course—Findings of Trial Judge—Signatures of Defendants — Knowledge of Nature of Document Signed—Evidence—Examinations of Parties not Put in at Trial — Agreement Put in after Close of Evidence — Admission of Written Argument of Counsel—Motion for New Trial—Result not Affected by Irregularities—Appeal.

Appeal by defendants from judgment of MACMAHON, J., 8 O. W. R. 662, in favour of plaintiff in an action upon a promissory note for $666 and interest.

W. Proudfoot, K.C., for defendants.

L. J. Reycroft, Ridgetown, for plaintiff.

The judgment of the Court (MULOCK, C.J., ANGLIN, J., MAGEE, J.), was delivered by

ANGLIN, J.:—The trial Judge found that plaintiff became a holder of the note in due course: R. S. C. 1906 ch. 119, sec. 56. From this finding defendants do not appeal, and it is impossible to conceive that they could do so successfully upon the evidence before the Court. The trial Judge, disbelieving defendants, further found that they

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signed the note in question knowing its nature and effect and intending to bind themselves as makers; and further, that, if they were truthful in their story that they signed the note not knowing that it was a note, and believing that it was merely an agreement respecting the purchase of a horse, and that they were so informed by one Watterworth, agent for the original payees, who procured their signatures, their negligence in affixing their signatures without looking at or reading the documents was so gross that their ignorance could not avail them as a defence against plaintiff.

The note in question is partly in print and partly in very plain writing. Defendants are intelligent farmers, admittedly able to read and write, and their negligence in signing such a document, in the circumstances to which they themselves deposed at the trial, scarcely admits of question.

While the other findings stand, even if the finding which is made against them, because their testimony is discredited as above stated, should for any reason be set aside, the judgment in appeal could not be successfully attacked: R. S. C. 1906 ch. 119, sec. 74; Hunter v. Walker, L. R. 7 ch. 75, 84, 87; Ewart on Estoppel, pp. 104, 435; London v. Wentworth, 5 Ex. D. 96, 104, 105; Foster v. MacKinnon, L. R. 4 C. P. 704; Putnam v. Sullivan, 4 Mass. 45, 54; Alloway v. Hrabi, 14 Man. L. R. 627; Daniell on Negotiable Instruments, 5th ed., p. 863.

But it is urged that the case should be remitted for a new trial because: (a) the trial Judge, having heard oral argument from counsel for defendants at the trial, received, by arrangement with counsel, a written agreement from counsel for plaintiff, and proceeded to give judgment before counsel for defendants had sent in a reply to such written argument; (b) the trial Judge in his judgment refers to certain portions of the examinations for discovery of the several defendants which were not put in at the trial as part of plaintiff's case or specifically alluded to in the cross-examination of these defendants when giving evidence at the trial; and (c) because he received in evidence, after the close of the trial, an agreement referred to in the course of the trial, but not then produced or available in evidence, and which counsel for defendants had not seen.

It is further contended that to the note in question 2 signatures were procured as makers, after it had been signed by the other 4 makers upon an understanding that

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they were to be the only makers of the note, and that this is such a material alteration as vitiates the note. The addition of the names of the 2 makers to the note after it was signed by the other 4, even if the latter did not contemplate that this should be done, is not, in my opinion, a material alteration which would vitiate the note or affect the liability of the 4 original makers upon it. But, if it were, there being no alteration apparent upon the note, the fact of such alteration, though material, would not affect the right of plaintiff, as a holder in due course, to sue upon it: R. S. C. 1906 ch. 119, sec. 145.

This objection being thus met . . . the judgment in appeal must be sustained; unless the findings that plaintiff is a holder in due course and that defendants were grossly negligent in affixing their signatures to the note in question (asuming in their favour their ignorance of its nature and contents), can be successfully attacked.

As to the first of these findings, it is manifest that in making it the mind of the trial Judge could not have been in any wise affected by a perusal of the examination for discovery of defendants, or by a consideration of the agreement put in after the trial, to which plaintiff was not a party, and of the existence of which there is no evidence that he was at any time aware; neither do I find anything in Mr. Reycroft's written argument which could have weighed with the trial Judge in making this finding, which indeed counsel for defendants did not attempt to attack, and which depends entirely upon the uncontradicted evidence of plaintiff and Mr. Watterworth. Upon the whole evidence, no other finding would be possible than that plaintiff was a holder in due course of the note in question.

Upon the second finding, namely, that, if ignorant of its nature and contents, defendants were grossly negligent in affixing their signatures to the note, the case is precisely the same. This finding depends upon the following undisputed facts: (a) that defendants are intelligent men, able to read and write, and with a fair knowledge of business; (b) that the note in question is a plain, legible document, comprising words few in number and unmistakable in meaning, owing to their directness and simplicity; (c) that there was no such relation of confidence or trust between defendants and Watterworth as would afford any pretence of justification for their reliance upon any statement of his as to the nature or contents of such a document to which they were asked

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to affix their signatures. These facts were established by the evidence and the demeanour of defendants at the trial and by the internal evidence afforded by the note itself when produced.

The perusal of the examinations for discovery can have had no effect on the mind of the trial Judge in making this finding. Upon the evidence, apart entirely from that examination, no other finding could be made than that the conduct of defendants, as deposed to by themselves at the trial, was grossly negligent. The agreement put in after the trial has no conceivable bearing upon this finding. But, if it had, I should not hesitate to find, upon the material before the Court, that this agreement was obtained by Mr. Reycroft, at the request of the trial Judge made in presence of counsel for defendants, and that it was well understood that when obtained it should be sent to the trial Judge precisely in the manner in which it was sent. I would be unable to find, upon the material before us, that there was any understanding that the agreement itself should be shewn or a copy of it sent to counsel for defendants. But the fact that the perusal and consideration of this document cannot possibly have had any effect upon the finding now under discussion is a conclusive answer to the appeal upon this ground.

In his written argument, which I have carefully examined, counsel for plaintiff dwells upon the legal effect of the negligence of defendants in signing the note and the evidence upon which the finding of their negligence rests. . . . Counsel for defendants presented his argument on their behalf orally at the conclusion of the evidence on 9th October, and it was wholly due to the pressure of business at the Chatham sittings that counsel for plaintiff was not then heard in reply. He sent in his written argument on 16th November, forwarding a copy at the same time to counsel for defendants. Judgment was delivered on 24th November. This being a common law action, in which defendants adduced evidence, counsel for defendants was properly called upon first to address the Court, and counsel for plaintiff had the right of closing the argument by his reply: Archbold's C. L. Prac., 14th ed., p. 645; Holmested & Langton's Jud. Act, 3rd ed., p. 754. Upon the conflicting affidavits filed, it is impossible to find that there was any arrangement or understanding that this regular practice would be departed from. But, if there were, and if counsel

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for defendants had any reason to expect that he would be heard by way of rejoinder to Mr. Reycroft's argument in reply, we have now had the benefit of all that Mr. Proudfoot can urge by way of rejoinder to that argument, and it is manifest that, not upon any conflict of evidence, not because any witness favourable to the contention of defendants should be discredited, but upon defendants' own version at the trial of their conduct in connection with the placing of their signatures to the note in question, taken with the silent but most cogent testimony afforded by the note itself, no other finding is possible than that defendants were most grossly negligent.

Not only would no good purpose be served—it would be distinctly wrong—were we to send this case down again for trial, when it is so clear that no different result could follow.

If the judgment depended at all upon the finding that defendants in fact knew the nature and contents of the document which they signed, a case might, perhaps, be made out for granting a new trial, because of the references to the examinations for discovery. Here, however, it is beyond doubt that upon the two questions on which the judgment against defendants really rests, the material, which was admittedly properly before the Court, in the light of the fullest argument by counsel for defendants, not only warrants the findings made, but renders them inevitable.

Appeal dismissed with costs.

MABEE, J. APRIL 12TH, 1907.

CHAMBERS.

TORONTO CREAM AND BUTTER CO. v. CROWN BANK OF CANADA.

Security for Costs—Action Brought by Liquidator in Name of Company in Liquidation—Liability for Costs—Assets of Company—Undertaking of Liquidator.

Appeal by defendants from order of Master in Chambers, ante 543, dismissing motion by defendants for security for costs.

F. Arnoldi, K.C., for defendants.

J. R. Meredith, for plaintiffs.

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MABEE, J.:—The plaintiff company are being wound up. t was said there might be something like 40 cents in the ollar for creditors. This action was brought by the liqui-ator under an order of the Master in Ordinary. The pro-edure taken was proper, and no objection is raised to the orm of the action. Defendants say that, the company eing insolvent and the liquidator not being a party, they re entitled to some protection as to the costs of the de-ence in the event of the action failing. They applied to he Master in Chambers for an order for security, which as refused, and they now appeal.

Of course, as the liquidator is not a party to the action, o order could be made against him personally. The Master hought, as there would probably be no distribution of the state while the action was pending, defendants would be n no position of peril in the event of their succeeding in heir defence, as the Court could see that they were pro-ected out of the estate. There is said to be some $4,000 ow in hand.

Defendants are not creditors of the company, and are ot parties in any way to the winding-up proceedings; so, nless they keep an eye upon the proceedings for wind-ng-up, they may in the end have trouble in being indemni-ied. The Master gave them leave to apply again if there is ny reason for thinking that any distribution of the assets ight be made while the action is pending. I see no good eason for leaving defendants in that position. The action s entirely under the control of the Court; it could not have een instituted without first obtaining the Court's authority; and the action should only be allowed to proceed upon first seeing that, if it fails, the costs of defendants will be pro-vided for.

It is not the ordinary case of ordering security for costs; it is simply the case of the Court saying to its officer, the liquidator, that he must make provision for the payment of defendants' costs, if called upon at the end of the liti-gation. It was admitted that when the time came the costs could be ordered to be paid out of the estate in his hands, and I see no reason why the liquidator should not at this stage be directed to set aside and retain a proper sum to pay such costs. There is no reason why defendants should be compelled to defend against an insolvent company, and run any risk as to their costs of defence. I do not put the case upon the ground that the plaintiffs are nominal

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ones and the action for the benefit of the creditors. I think the only way the action could proceed . . . is in its present form. I regard it more as being a proper condition that the Court should impose upon its officer in sanctioning the litigation, or in permitting it to proceed.

In Re Baden Machinery Co., 12 O. L. R. 634, 8 O. W. R. 555 . . . the liquidator was a party to the proceedings. He had commenced them in his own name, and no question of security for costs arose.

I think the liquidator should be directed to file in Court an undertaking in the sum of $400, in the form appearing in Hawkins v. Want, 9 Times L. R. 481, and that defendants should have leave to apply to have any additional or further undertaking of the like character, if the case justifies such application.

The Master dismissed the motion with costs. I would allow the appeal with costs to defendants in any event, but make the costs of the motion before the Master costs in the cause to the successful party.

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THE

ONTARIO WEEKLY REPORTER

(To and Including April 20th, 1907).

L. IX. TORONTO, APRIL 25, 1907. No. 15

ALCONBRIDGE, C.J. April 12th, 1907.

WEEKLY COURT.

Re BASTEDO.

ill—Construction—Devise—Successive Estates Tail—Bar—Mortgages by Tenant in Tail—Fee Simple.

Motion by the administrator of the estate of James astedo for a summary order under Rule 938, determining rtain questions arising under the will of Gilbert Bastedo e elder, deceased.

The testator devised his farm to his son David, subject certain "restrictions, regulations, and donations," and ded: "It is my express will and desire that should my n David Bastedo die without male issue lawfully begotten, en after the marriage or decease of his widow that my son lbert Bastedo shall inherit the said freehold estate in the me manner, and should Gilbert have no issue as aforesaid, en to my son James and his issue, subject to the restric-ns and reservations hereinbefore mentioned."

David died unmarried in 1898; Gilbert died without ue in 1902; and James died in 1904, leaving issue.

J. Bicknell, K.C., and J. W. Elliott, Milton, for the ad-inistrator of the estate of James Bastedo.

F. R. Ball, K.C., for daughters of testator.

W. T. McMullen, Woodstock, for widow of Gilbert Bas-do the younger.

W. Davidson, for Bruce Muir, grandson of testator.

M. C. Cameron, for infant children of James Bastedo.

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FALCONBRIDGE, C.J.:—I do not th
possible way to give effect to the wh
except by adopting the contention of t
James Bastedo. The expressions "i
and "as aforesaid" point irresistibly t

The result is that David took an
Gilbert took the same estate, and so d
James's estate was in tail general, alt
terial; for James has made mortgages
entail: Re Lawlor, 7 P. R. 242.

Bruce Muir is the son of a granddau
he would have no rights in any aspect
5th ed., vol. 1, p. 912; Leith's Blackst

The children of James are, theref

Costs to all parties out of the esta

CARTWRIGHT, MASTER.

CHAMBERS.

FLANNER v. WALLA

Particulars—Statement of Claim—Disc
Documents—Contract—D

Motion by defendants for particul
claim.

Grayson Smith, for defendant.

W. E. Middleton, for plaintiffs.

THE MASTER:—The action is on a
made in December, 1905. It is not
agreement was oral or in writing. Da
the amount of $6,250, but no sufficient
as to how that sum is made up.

The cause was at issue early in Dece
later particulars under both the foreg
manded. By letters of 21st January,
7th March, plaintiffs' solicitors agreed
last letter of the series said: "We sha
particulars by next mail."

This was not done. On 11th March
solicitors wrote a letter headed "Pers

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ce," still excusing the delay on the ground of press of siness and of waiting for information from plaintiffs d "from our counsel in Toronto," Then on 19th March aintiffs' solicitors wrote: "After consulting with counsel reference to your demand for particulars, we do not ink we should comply with same." Thereupon the pre-nt motion was made asking for full particulars as they d been demanded and agreed to be given nearly three onths ago.

Plaintiffs have not been examined for discovery; and it s objected that this should have been done first, and at the present motion was premature. In support of this ank of Toronto v. Insurance Company of North America, P. R. 27, was cited.

The affidavit of defendant's solicitor points out that ese particulars were promised long ago, no objection being ade to them in any way; and that, as plaintiffs reside and rry on business in Ohio, it would be necessary to have scovery under a commission. This would be much more pensive than having particulars.

It may be that if particulars had been refused at first, fendant might have been required to take discovery. ot that the judgment in Smith v. Boyd, 17 P. R. 463, in y opinion requires that an examination for discovery ould be a necessary part of the procedure in every case fore particulars can be ordered after the cause is at issue. does not appear whether plaintiffs have made any affidavit production. If they have done so, it must appear therein hether they are relying or not on a written agreement. he statement of defence sets up the execution by defendant a written agreement, which he says was afterwards wrong-lly altered by plaintiffs. Plaintiffs have merely joined sue on the statement of defence, so that it is not shewn they are relying on the agreement allged by defendant. his may as well be made plain now, if it is not to be found plaintiffs' affidavit on production.

In any case defendant is entitled to particulars of plain-ffs' claim for damages, shewing how much is claimed for ss on lumber and how much on the lath. These should e furnished in 10 days. What disposition is to be made of e other branch of the motion for particulars will depend on hat has been done by plaintiffs as to an affidavit on pro-uction. Costs will be in the cause.

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MABEE, J. APRIL 15TH, 1907.

CHAMBERS.

PETERBOROUGH HYDRAULIC CO. v. McALLISTER.

Third Party Procedure—Claim for Indemnity—Order Allowing Third Party Notice to be Served—Rules 209, 213—Order Directing Trial of Third Party Issues—Provisions of.

Appeal by the Ontario Bank from order of local Master at Peterborough under Rule 213, upon several grounds. A third party notice, pursuant to leave for such purpose, had been served upon the bank, through their solicitors accepting service on 14th March, and appearance was duly entered. The order in appeal was made on 4th April, and provided for the manner in which the action should proceed.

A. B. Morine, for appellants.

D. O'Connell, Peterborough, for defendants.

F. D. Kerr, Peterborough, for plaintiffs.

MABEE, J.:—It was contended for the bank that the facts did not disclose grounds for bringing them in, and no order should have been made at all. . . .

The action is brought to recover $750, being one quarter's rent alleged to be payable by defendants to plaintiffs under the terms of a lease dated 30th September, 1902, for a period of 10 years, at a yearly rental of $3,000, payable quarterly in advance. The instalment sued for is alleged to have become payable on 1st January, 1907. The defendants obtained leave to serve the third party notice upon the bank, and justify their right to the third party procedure, under the practice, by reason of an agreement entered into between themselves and the bank on 19th September, 1905. The documents embodying this agreement are produced, and they shew that upon that date the defendants were indebted to the bank in the sum of $69,200, which they were unable to pay in full, and that it had been agreed that in consideration of the payment of $10,000 and the absolute assignment of all the defendants' assets to the bank, the latter should release them from all liability:

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that C. B. McAllister, one of the defendants, should continue to carry on the business under the firm name and be paid $1,000 per year for his services, the business to be under the supervision of the manager of the bank at Peterborough, to whom McAllister was to be accountable for all transactions, but the latter was not to be responsible for any error of judgment or for any losses incurred; and the bank agreed "to indemnify the said company and the members thereof against any liabilities incurred while the business is being continued in the company's name." In another document, bearing the same date, containing similar and additional recitals to the one above referred to, the defendants surrendered to the bank all their assets, and agreed to "assign to the bank their lease of the Otonabee mills, as well as all claims to damages which they have against the Peterborough Hydraulic Power Company . . . and they authorize the bank to bring such action or actions in their names as may be necessary to recover said damages, the bank agreeing to indemnify them in respect of all costs relating to the same."

This agreement deals also with the payment of the 10,000, provides also for other matters, and contains a provision that the bank shall forthwith release the defendants from all further liability in respect of their indebtedness to the bank, and winds up as follows: "In the event of the said business being hereafter carried on in the name of the said company, as provided in the agreement bearing even date herewith . . . or in any similar way, the bank hereby agrees to indemnify the said company and the individual members thereof against any and all liabilities then thereby incurred."

On the same day the bank gave to the defendants a general release of all demands. The business in question is the manufacture of flour. It was carried on in the Otonabee mills under lease from the plaintiffs; it was said that the $10,000 was paid to the bank. The defendants, on the foregoing facts, say the bank must indemnify them against the rent payable under the lease if they are liable to plaintiffs. The lease sued upon is the one defendants agreed to assign to the bank.

It was argued that all this was beyond the bank's powers, various provisions of the Bank Act were cited; also, that the agreements were executed by the local manager at Peterborough, and were not binding upon the bank. I

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think I have nothing to do with these questions upon this motion. All that defendants require is to make out a prima facie question for trial of their right to indemnity from the bank. It may, however, be noted that the general release from the bank purports to be signed by the then general manager, and has the seal of the bank attached. I think defendants have shewn ample facts entitling them to have this claim over against the bank tried, and I see no reason why it should not be disposed of in this action. Plaintiffs do not appeal; the order is not objected to by them; indeed it was supported by Mr. Kerr; so there is no question of inconvenience to them or delay in the trial of the action involved. I think the case falls well within Rule 209.

The order in appeal for directions as to trial is, however, I think, entirely wrong. It provides that the bank may defend the action in the same manner as if originally made a defendant; that the plaintiffs and defendants should have liberty to examine the bank's officers for discovery; and that "examinations for discovery between the plaintiffs and defendants shall be considered as evidence between the defendants and the third party;" that "the defendants and the third party may in their respective statements of defence or subsequent pleadings claim against each other by way of counterclaim or otherwise, whether the same be against the plaintiffs, the defendants, or the third party;" that "the plaintiffs may have judgment in this action against the defendants, or either or both of them, or the third party, or all of them, if the trial Judge in his discretion thinks fit to so order, and that all pleadings and proceedings in this action be delivered and taken with this end in view."

It was said that the bank repudiated any desire to defend the action, or to take part in the defendants' defence at the trial, but under this order the plaintiffs may examine the officers of the bank; they are required to claim direct against the third party; and the latter may counterclaim against the plaintiffs; the defendants may examine the plaintiffs and read those depositions against the bank; the bank officers' depositions may be put in as evidence at the trial as against the bank, or the plaintiffs, or by the plaintiffs against the defendants. Of course these provisions cannot be supported.

It may be that this strange and novel mode of procedure was adopted by reason of the provisions in the agreement that the damages the defendants claimed against the plaintiffs should be assigned to the bank; the pleadings, however,

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ew that these alleged damages form the subject of a ounterclaim by defendants against plaintiffs.

The first five clauses of the order must be struck out, nd, instead thereof, provision made for the defendants elivering a statement of claim to the third parties; the latter plead as they may be advised; the third parties to be bound any judgment plaintiffs obtain against the defendants at e trial; the issue between the defendants and the third arties to be tried separately; and, after the trial of the action, unless the trial Judge otherwise orders, issues between e defendants and the third parties to be set down by defenants for trial at the same sittings at which the action is t down for trial.

The bank must have the costs of this appeal against the efendants in any event of the cause; no costs of appeal to e plaintiffs.

IABEE, J. APRIL 15TH, 1907.

WEEKLY COURT.

RE BROWN AND TOWN OF OWEN SOUND.

Municipal Corporations—By-law for Closing of Road—Injury to Lands Adjoining—Compensation to Land Owner—Advantage from Works Erected on Portion of Road Closed—Arbitration — Refusal of Arbitrator to Set off—Appeal from Award — Amount Allowed — Lands Abutting on Highway.

Appeal by the corporation of the town of Owen Sound rom an award made by HATTON, Co. C.J., allowing the repondent $500 damages for depreciation in value of her lands, ccasioned by the closing of a road which gave access thereo, and cross-appeal by the respondent from the award, seekng to increase the amount.

F. E. Hodgins, K.C., and J. W. Frost, Owen Sound, for he town corporation.

H. E. Sampson, Owen Sound, for Mrs. Brown.

MABEE, J.:—The lots in question front upon Bay Shore oad, and Rear street is at the back. The by-law provided

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for closing Bay Shore road, and it has been closed up to lot 23 owned by the respondent; another means of access was provided.

By-law No. 1123, being a by-law to grant tax exemptions, free water, etc., to the Carney Lumber Co., required approval of the electors before being finally passed. It provided that park lot 22 should be sold to the company, and, among several other things, that the road in question should be closed across this lot. The electors approved of the by-law; it was dated 14th November, 1904; the vote on it was taken on 2nd January, 1905.

By-law No. 1145, passed by the council on 15th May, 1905, provided for closing the road. The Carney Co. purchased lot 22, constructed large mills upon the lands, and employ a large number of persons. The By-law No. 1123 made provision for opening a road in lieu of the one to be closed, and by-law No. 1145 recites that such new road had been opened.

The erection of the mills by the Carney Co. greatly enhanced the value of the respondent's lands, and the appellants contend that this increase in value is an "advantage" within sec. 437 of 3 Edw. VII. ch. 19 (O.) The County Court Judge thought not and I agree with him. In so far as the respondent was concerned, the "contemplated work" was the closing of the road. This was part of the general scheme, and was necessary for the Carney Co.'s works, and it seems impossible to believe that the corporation could in effect deprive the respondent of her right to compensation by including the proposal to close the road in the bonus by-law. Closing the road did not require the sanction of the electors, and, I presume, was included in the earlier by-law so that the whole proposition might be before the public. The road in fact was closed under by-law No. 1145. Under sec. 437 the corporation must make compensation for the damages necessarily resulting beyond any advantage the claimant may derive from the contemplated work. What is the work contemplated? Not the work of the Carney Co., but the work of the corporation. It is, doubtless, true that the land of the respondent shares with other lands in the vicinity an advantage from the expenditure made by the Carney Co., and the employment by them of a large staff, but the only work the corporation had in hand affecting the land in question was, I think, the closing of the road. . . .

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[In re Pryce and City of Toronto, 20 A. R. 16, distinguished.]

No case was referred to in which it had been held that matter extraneous to the actual work undertaken by the corporation could be considered, and it seems to me that the intent and meaning of the section is, that the advantage which the claimant derives, which is to be considered, is from the "contemplated work" of the corporation alone. Here, if the Carney Co. had not proceeded with the erection of their works, the closing of the street would confer no advantage, so any advantage derived is not conferred by the passing of the by-law for closing the street, or what was done under it, and is attributable to other causes. It might perhaps also be said that here there was no work contemplated by the by-law, and so that portion of the section does not apply.

Section 629 provides that no road allowance shall be closed whereby any person will be excluded from ingress and egress over such road, unless, in addition to compensation, some other convenient way is provided. By the road in question the respondent had ingress to and egress from her lands. Mr. Hodgins contended that the road did not abut upon the respondent's lands, and cited the judgment of Patterson, J.A., in Vandecar v. East Oxford, 3 A. R. at p. 141. . . . The arbitrator has found the fact to be, and the plans filed also shew clearly, that the road passed along the front of the respondent's lands, and the portion closed is immediately adjacent to the westerly frontage, so, as it is left, there is a road across the front of the lot but terminating at that boundary, so there is no ingress to or egress from this land where formerly there was.

Re Adams and Township of East Whitby, 2 O. R. 473, and Re Thurston and Township of Verulam, 25 C. P. 593, were also cited, but I see nothing in them in the respondent's way.

The case is stronger for the respondent than In re Tate and City of Toronto, 10 O. L. R. 651, 6 O. W. R. 670, where it was held that compensation could be allowed for closing a street, although the lot in question did not abut the street closed.

Reliance was placed upon The King v. MacArthur, 34 S. C. R. 570, but I do not think the case is applicable either in the facts or in the principle involved.

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In the view I take, the respondent became entitled to compensation, and the County Court Judge was right in refusing to consider the alleged advantage arising from the location, construction, and operation of the Carney works.

The respondent claimed by her cross-appeal to have the damages increased. I have read a good deal of the evidence, and agree entirely with the conclusions reached by the arbitrator and his reasons for the same.

The main appeal will be dismissed with costs, and the cross-appeal without costs.

CARTWRIGT, MASTER. APRIL 16TH, 1907.

CHAMBERS.

IMPERIAL TRUSTS CO. v. NEW YORK SECURITIES CO.

Mortgage—Redemption—Extension of Time—Terms—Costs.

Motion by defendants for further time to redeem, previous orders extending the time having been made: see ante 45, 98.

G. H. Kilmer, for defendants.

W. H. Lockhart Gordon, for plaintiffs.

THE MASTER:—The facts of this case appear in the previous report, ante 98.

The defendants have shewn their good faith by complying with the terms of the order of 16th January. They have not yet succeeded in selling their property, and are asking a further extension in view of the great appreciation in the value of iron. . . .

The defendants evidently are sincere in their estimate of the value of the mine. If they are right, the plaintiffs have ample security—if they are wrong, the plaintiffs will still have the property, which runs no risk of depreciation. The time for redemption will, therefore, be extended for 4 months on the following terms:—

The costs of this motion, fixed at $20, are to be paid in a week.

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The defendants are to pay $1,500 in 3 weeks from this date, and a further sum of $1,500 in 2 months thereafter.

The account will be taken in the same way as in the previous order, except that interest shall cease on the above amounts when paid.

ANGLIN, J. APRIL 16TH, 1907.

CHAMBERS.

OUTERBRIDGE v. OLIPHANT.

Discovery—Production of Documents—Letters in Possession of Defendant's Agents—Refusal of Agents to Give up.

Appeal by defendant from order of Master in Chambers, ante 596.

R. W. Eyre, for defendant.

G. H. Kilmer, for plaintiff.

ANGLIN, J., affirmed the Master's order.

ANGLIN, J. APRIL 16TH, 1907.

WEEKLY COURT.

RE MILLS AND CITY OF HAMILTON.

Municipal Corporation—By-law for Closing Lane and Opening New Lane—Interests of Private Persons—Interests of Municipality—Injury to other Persons—Private Lane—Exchange of Lands—Bona Fides of Council.

Motion to quash a by-law.

E. F. B. Johnston, K.C., and E. H. Ambrose, Hamilton, for the applicants.

Wallace Nesbitt, K.C., and G. S. Kerr, Hamilton, for the respondents.

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ANGLIN, J.:—The applicants seek to quash a by-law of the city of Hamilton, No. 565, "for closing a portion of the alley running from James street to Hughson street, between King street and King William street, and opening in lieu thereof an alley extending from the northerly boundary of the first mentioned alley to the south side of King William street." The by-law also provides for the transfer of the portion of the alley in exchange and as compensation for the lands requisite for the opening of the alleyway substituted therefor. The effect of the change, if the by-law is carried out, will be that in lieu of an alleyway extending directly from James street to Hughson street, parallel thoroughfares, there will be an alleyway extending from James street about three-fourths of the former distance, and then turning at right angles northerly to King William street. There will also be at the turning point an area of about 30 feet square, intended to enable vehicles to pass and turn, and the new alleyway will, for the greater part of its length, have a considerably greater width than the portion of the alleyway which it is intended to close up, which lies between two buildings fronting on Hughson street, owned and occupied by Thomas W. Watkins as a departmental store. The by-law purports on its face to provide for the expropriation by the city of Hamilton of the parcels of land requisite for the opening of the new alley, but it was stated at bar and conceded that Mr. Watkins is to acquire these lands and transfer them to the municipal corporation. Clause 3 of the by-law is as follows:—

"This by-law shall not take effect until Thomas William Watkins has entered into an agreement with this corporation that he will erect on his property on Hughson street, being part of lot 29 on the south-west corner of King William and Hughson streets, a six-storey brick building for the purpose of extending his business, at a cost of $40,000 or thereabouts, the westerly end of such building to be a fire wall, and said building to have a sprinkler system for fire protection and fire escapes, and that he will pave the alley so to be opened to the satisfaction of the city engineer, such pavement to be maintained and repaired for all time by the said Thomas William Watkins and his heirs, executors, and administrators, and also that the said Thomas William Watkins, his heirs, executors, and administrators, will erect and maintain forever an electric or other light to the satisfaction

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of the city engineer, in said alley to be opened, and will also install in said alley to be opened such hydrants or standpipes as the city engineer may consider necessary."

It is also conceded that the by-law was passed at the instance of Mr. Watkins, but the terms obtained from him by the municipal council appear to be distinctly more advantageous to the city than those which formed the basis of Mr. Watkins's original proposition.

The by-law was passed after proper notice and after hearing all persons whose lands might be prejudicially affected, as required by sec. 632 of the Consolidated Municipal Act, 1903.

The by-law is attacked by the applicants upon the grounds: (1) that it was not passed to subserve interests of the public, but those of Thomas William Watkins, at whose request and in whose interest it was enacted; (2) that the by-law would cause damage and injury to the applicants for the benefit of the said Watkins; (3) that the by-law is ultra vires, because the alley, of which a portion is to be closed, is a private alley; (4) that the corporation has no power to exchange the portion of the alley closed for other lands to be acquired by Watkins and transferred to the corporation.

Section 637 of the Consolidated Municipal Act enables the council of every city to pass by-laws "for . . . altering, diverting, leasing, selling, or stopping up . . . alleys, lanes . . . or other public communications wholly within the jurisdiction of the council." Section 632 prescribes the conditions upon which such by-laws may be passed.

Upon the argument I expressed the opinion, to which I adhere, that I should not enter upon a consideration of the debatable question whether the alleyway, as it is proposed to be altered, would be more or less beneficial to the public and to the property owners generally, who make use of it, than it is in its existing state. Such a question is eminently for the consideration and determination of the municipal council, and their judgment upon it, if bona fide exercised in what they believe to be the public interest, should not be interfered with by the Courts. Upon the material before me, this question is certainly debatable, and, after a careful perusal of all the material, I rather incline to the opinion that the proposed change is in the interests of the majority of the property owners who ordinarily use the lane in question, and also in the interests of the general public of the city of

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Hamilton. But a consideration of this question should only be entered upon for the purpose of enabling the Court to ascertain whether the proposed change is so manifestly in the public interest or against the public interest that it warrants, either alone or in conjunction with other circumstances, a conclusion that the council was actuated by proper or improper motives in passing the by-law. The proposed change is not so clearly for or against the public interest that it leads me to any conclusion as to the bona fides of the action of the municipal corporation.

It is tolerably clear that the change will, to some extent, prejudicially affect the applicants. I cannot, however, think that the injury to them will be at all as great as they profess to anticipate. On the contrary, in my opinion, they will be very slightly injured—indeed, so slightly, that this consideration should not be allowed to stand in the way of any real public benefit which the proposed change may confer.

The proposition is abundantly clear that "corporations are trustees of their powers for the general public, and when they prostitute them for the benefit of one individual at the cost of another, the general public not being interested, their action will be restrained by the Courts:" Re Morton and Corporation of St. Thomas, per Osler, J., 6 A. R. 325, affirmed by the Court of Appeal; Pells v. Boswell, 8 O. R. 680; Re Waterous and City of Brantford, 2 O. W. R. 897, 4 O. W. R. 355.

The question for determination in the present instance is whether the impugned by-law was passed solely or principally to benefit Mr. Watkins, or whether, though Mr. Watkins will undoubtedly derive some advantage from it, the municipal council was actuated chiefly by a bona fide desire to benefit the public, for whom it holds and should exercise its powers as a trustee. It cannot be said that the change was imperatively necessary in the pubilc interests, and it is quite apparent that it would not have been attempted but for the intervention of Mr. Watkins. It is also manifest that he will benefit very considerably by it. But it is made clear by the affidavit of Thomas Joseph Stewart, chairman of the board of works, that the advantages and objections to the proposed change were fully considered and discussed by the board; and that the advantages, direct and indirect, to the city, in his judgment, and that of his fellow members, outweighed the objections. I cannot refuse credence to the affi-

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davits of Mr. Stewart and the other members of the board of works, and to those of practically all the aldermen of the city of Hamilton, in which they affirm that they were actuated by what they considered to be the best interests of the public in supporting this by-law. I fully recognize that the consideration which chiefly influenced the members of the council probably was the expectation that the proposed addition to Mr. Watkins's premises—referred to in the third clause of the by-law above quoted—will result in a general benefit to the citizens of Hamilton "by the expenditure of a large amount of money in building operations; that the increase in his premises will necessitate the employment of a large number of persons, and will induce the expenditure of a large amount of money in Hamilton, which, under present conditions, is spent in the large dry goods shops in Toronto, Buffalo, and other cities." At the same time I cannot say that these deponents are not honest in the statement which they make, that they "consider the proposed diversion to be an important permanent improvement to the city." I am unable to accede to Mr. Johnston's view that in order to support the by-law it is necessary to establish that, in the opinion of the council, the closing of the alleyway was in itself, and apart from any indirect and consequential advantages, such as the anticipated benefits to be derived by the citizens at large from the increase in Mr. Watkins's business, distinctly in the public interest. I know of no authority which warrants such a proposition. I think it competent for the council to take into consideration all benefits of a public character which are likely to flow from the proposed change, whether they be direct or indirect, immediate or remote.

Upon the whole of the material, which I have carefully considered, I find it impossible to reach the conclusion that the municipal corporation has been actuated, in passing this by-law, by any improper motives. It would require a very much stronger and a very much clearer case, in my opinion, to warrant me in discrediting the sworn statements of the mayor and members of the council, that when passing this by-law they believed it to be in the best interests of the citizens of Hamilton, whom they represented.

Upon the material it seems clear that the alley in question is not a private alley. Some years ago the present applicants themselves treated it as a public alley, and at their instance it was so treated by the municipal corporation.

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Public money has been spent for many years upon it. It has been, in my opinion, established that it is an alley or lane wholly within the jurisdiction of the municipal council (sec. 637).

Although sec. 637 in terms authorizes the municipal council only to lease or sell alleys or lanes stopped up or closed, the method of selling or disposing of such lands is not prescribed. In the present instance it is proposed to exchange the portion of the lane closed up for the larger piece of land requisite for the proposed substituted lane. This is in effect a sale of the land, the consideration, instead of money, being the acquisition of other lands. If it were necessary to put these lands up for sale by public auction, some one, other than Mr. Watkins, might bid for them, not with any intention of acquiring them, but for the purpose of preventing Mr. Watkins securing them. In this way one of the principal benefits to the municipality, which it is the object of the proposed exchange to secure, and which influenced the municipal corporation in carrying out this scheme, might be frustrated. In the absence of anything in the nature of fraud or of any suggestion that the consideration which the corporation will obtain for the lands to be given to Mr. Watkins, is not adequate, I do not think the objection to the form in which the disposition of these lands is made should prevail.

The motion therefore fails and must be dismissed with costs.

APRIL 16TH, 1907.

DIVISIONAL COURT.

DEELEY v. CANADIAN WESTINGHOUSE CO.

Master and Servant—Injury to Servant—Negligence—Factories Act—Dangerous Machine—Want of Guard—Impracticability of Secure Guard—Findings of Jury.

Appeal by defendants from judgment of CLUTE, J., upon the findings of a jury, in favour of plaintiff for $900 damages for personal injuries sustained while in the employment of defendants, owing to negligence as alleged.

J. W. Nesbitt, K.C., for defendants.

G. Lynch-Staunton, K.C., for plaintiff.

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The judgment of the Court (FALCONBRIDGE, C.J., BRITTON, J., RIDDELL, J.), was delivered by

RIDDELL, J.:—Plaintiff was in the employ of defendants, and was working as a sawyer when the casualty the occasion of this action took place. The saw at which he was working contained two saws, either of which but not both together could be brought into operation. This was for the convenience of defendants, and is described as "only making two saw tables into one." The two saws are known as "rip-saw" and "crosscut-saw," the latter being used only to cut into the lower side or edge of the material, the former to cut quite through. While using the rip-saw plaintiff had his hand cut by the saw. . . . At the trial the claim was limited to the neglect of defendants to comply with the provisions of the Ontario Factories Act, R. S. O. 1897 ch. 256, sec. 20 (a), which provides that "in every factory all dangerous parts of mill gearing, machinery . . . and all other like dangerous structures or places shall be, as far as practicable, securely guarded." No complaint is or can be made as to the saw, save that it was not securely guarded.

That it was not securely guarded in fact there is and can be no dispute, but it is contended by defendants that on this particular saw a secure guard is impracticable.

No doubt, a number of witnesses use that word; but it is apparent, and is indeed admitted, that what they mean is that when the crosscut-saw is being used, a guard cannot be successfully applied, and perhaps, as one witness says, a guard would be in the way when changing from one state of the machine to another, and "come in contact with the saws when you brought them up," though when the rip-saw was being used no difficulty existed in having a proper and efficient guard. There is no need for a guard when the crosscut-saw is in use, or when the saws are being brought up.

The evidence for plaintiff shews that a good and efficient guard placed on while the rip-saw was working could be put out of the way expeditiously if and when a change was desired. I find no evidence contradicting this. If there were evidence of that kind on the part of defendants, I should have difficulty in accepting it. There is nothing occult or obscure in the machine—nothing "such that inexperienced persons are unlikely to prove capable of forming a correct judgment

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upon without expert assistance:" see 1 Sm. L. C., 10th ed., p. 491, cited by Garrow, J.A., in McCaughey v. Gutta Percha Co., 2 O. W. R. 204, at p. 206.

I cannot think that defendants can be allowed for their own convenience to combine two machines into one, and then set up that they should be relieved of an obligation in respect of the combined machine when working in one particular way which they would have had to perform had the machine been adapted for working only in that way.

The jury have found that the saw could have been and should have been guarded, and I agree with them.

I do not think Jackson v. Grand Trunk R. W. Co., 2 O. L. R. 689, 34 S. C. R. 245, or McCaughey v. Gutta Percha Co., 2 O. W. R. 204, is of the slightest assistance to defendants in this case.

Appeal dismissed with costs.

ANGLIN, J. APRIL 17TH, 1907.

CHAMBERS.

RE CANADIAN ORDER OF HOME CIRCLES AND SMITH.

Life Insurance—Designation in Favour of Son of Assured – Condition that he shall not Receive Insurance Moneys until he Attains Age of 25—Ineffective Condition—Right to Receive Moneys at Majority.

Petition by the Canadian Order of Home Circles for leave to pay into Court the sum of $250, the sum representing the interest of one Augustus Smith in certain insurance moneys secured by a policy on the life of his mother, Eliza J. Smith. In her insurance certificate Eliza J. Smith originally designated Augustus Smith as a beneficiary to the extent of $500. By her will she reapportioned her insurance, reducing the interest of Augustus Smith to $250. By a further provision of her will she directed that her son Augustus should not be paid or receive his share of her insurance moneys until he should attain the age of 25 years. Augustus Smith had now attained the age of 21 years, but was not yet 25 years of age. In these circumstances the petitioners asked leave to pay the

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noneys into Court. To this Augustus Smith objected, claimng direct and immediate payment of this money from the etitioners.

W. A. Dowler, K.C., for the society.

W. J. T. Lee, for Eliza Smith.

ANGLIN, J.:—By sec. 160 of the Insurance Act, R. S. O. 897 ch. 203, the assured is permitted, by instrument in riting or will, to alter or vary the declaration or apportionnent previously made in regard to insurance moneys "so as o restrict or extend, transfer or limit, the benefits of the olicy" to any one or more of the preferred beneficiaries. Even if the assured is authorized by this provision to postone the period of enjoyment of the insurance moneys by ny preferred beneficiary, beyond the time at which he atains the age of 21 years, such a provision is, in my opinion, neffective. I am unable to distinguish between such a proision in regard to insurance moneys and a like provision in egard to personal property bequeathed by will. It is well stablished by a long line of authorities, of which I may reer to Wharton v. Masterman, [1895] A. C. 186, and Saundrs v. Vautier, Cr. & Ph. 240, that it is "the right of all ersons who attain the age of 21 to enter upon the absolute se and enjoyment of the property given to them by the will, notwithstanding any directions by the testator to the effect hat they are not to enjoy it until a later age, unless during he interval the property is given for the benefit of another," r unless the property is so clearly taken away from the desees up to the time of their attaining a greater age, as to nduce the Court to hold that as to the previous rents and rofits there has been an intestacy: Gosling v. Gosling, Johnon at p. 272. It is regarded as a necessary consequence of he conclusion that a gift has vested, that enjoyment of it nust be immediate on the beneficiary becoming sui juris. For this reason I think it too clear that the beneficiary is enitled to immediate payment to make the order asked for.

The motion will therefore be refused but in the circumstances without costs.

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ANGLIN, J. APRIL 17TH, 1907.

WEEKLY COURT.

RE DENISON.

Settled Estates Act—Will—Life Estate—Power of Appointment—"Settlement"—"By Way of Succession"—Order for Sale of Lands—Payment of Purchase Money to Surviving Trustee—Investment—Security.

Petition under the Settled Estates Act for an order authorizing the sale of land.

G. T. Denison, for the petitioner.

F. W. Harcourt, for the infants.

ANGLIN, J.:—Upon the argument I expressed the view that a strong case was made out for an order authorizing the sale which the applicant desires to have made, if the statute enables the Court to make such an order. The will of his father gives the applicant a life interest in the property in question, with a power of appointment by will to any one or more of his children; in default of issue to any one of his brothers or their sons; and in default of the life tenant devising the property and having no children of his own, to his brother Clarence. Having regard to the liberal construction placed upon the term "settlement" in the Settled Estates Act in such cases as Carlyon v. Truscott, L. R. 20 Eq. 348, and In re Cornell, 9 O. L. R. 128, 5 O. W. R. 60, I think the provisions of this will may be deemed to limit the property in question to the persons named "by way of succession." "The purchaser is a willing one and will be protected by secs. 39 and 40 of the Act:" In re Cornell. The order may therefore go for the sale, as prayed, pursuant to sec. 16 of the Settled Estates Act, R. S. O. 1897 ch. 71.

Section 33 of the same statute authorizes the payment of the purchase money, if the Court thinks fit, to any trustees of whom it shall approve. Having regard to the express discretion so conferred, I think I am warranted in acceding to the prayer of the petitioner that the purchase money may be paid in this case to George Taylor Denison, the sole surviving trustee under the will of the petitioner's father, to invest the same in securities permitted by law to be taken by trus-

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tees, the principal and income to be held by him in trust and disposed of in carrying out the purposes of the settlement above mentioned. The trustee must, however, give security in $25,000, to the satisfaction of the registrar, for the due performance of these trusts, before receiving payment of the purchase money. The costs of this application may be paid by the trustee out of the corpus.

CARTWRIGHT, MASTER. APRIL 18TH, 1907.

CHAMBERS.

STUART v. BANK OF MONTREAL.

Pleading — Statement of Claim—Amendment—New Cause of Action—Leave to Discontinue.

Motion by plaintiff for an order allowing her to amend the statement of claim and reply.

W. J. Elliott, for plaintiff.

W. E. Middleton, for defendants.

THE MASTER:—The statement of claim delivered on 7th January asks merely for an account of the dealings of the defendants with the securities transferred to them by plaintiff, who had at their request become a surety for the indebtedness of her husband. It alleges that these securities have been realized and have yielded a large surplus.

The statement of defence was delivered a week later. After setting out the plaintiff's guarantee and the facts leading up to its execution, the defendants allege that by a deed made on 20th July, 1904, by the plaintiff and her husband, a settlement was made of this whole matter, whereby the securities above mentioned were assigned absolutely to defendants, and the plaintiff and her husband were discharged from all liability to defendants. Defendants say, therefore, that plaintiff is precluded by laches from maintaining this action; and also by reason of defendants having dealt with them jointly liable with plaintiff's husband, to the knowledge of plaintiff, on the faith of the settlement of July, 1904, as being final and conclusive.

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On 7th February plaintiff replied denying that the deed of July, 1904, was intended to operate as an absolute assignment of the securities therein dealt with, and alleging that they were still to be securities only, and asked that, if necessary, the deed might be rectified accordingly.

Defendants joined issue on the reply on 15th February.

There has not as yet been discovery of any kind. . . .

The motion was supported only by an affidavit of plaintiff's solicitor stating that the amendment contemplated is in effect to set up the contention which was successful in Cox v. Adams, 35 S. C. R. 393.

No doubt, as was urged in support of the motion, Rule 312 is to be applied liberally so as to carry out the principles which it enunciates. But it must be remembered that there is a very wide difference between the case of a plaintiff and that of a defendant in the matter of amendments, as was emphasized by counsel for defendants. A plaintiff can bring as many actions as he pleases and can try more than once to accomplish his end. But a defendant occupies an entirely different position. He must succeed in the action itself or not at all. If he fails, he has no second chance, apart from appeals. It is therefore quite proper to give to Rule 312 a much wider and more extensive range on a defendant's application than would be proper or necessary when a plaintiff is moving to amend his pleadings when the cause is at issue.

The proposed amendment would in effect set up an entirely different case from that now before the Court, and one inconsistent with it. At present plaintiff affirms her original guarantee, but is asking to be allowed to endeavour to have it set aside.

It is just as if an action was brought to reform an agreement, and, when the cause was at issue, the plaintiff asked to amend so as to claim revocation on the ground of defendants' fraud. Even if the amendment asked for was allowed, it would not be of any greater benefit to plaintiff, so far as I can see, than if she was to bring a new action. But, whether that could be so or not, it is not, in my judgment, proper to allow what is asked. The ground now put forward is something that was all along known to plaintiff and her husband, and was not in any way concealed by defendants, which might be of great weight on such an application.

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The proper course for plaintiff, if she wishes to rely on Cox v. Adams, is to discontinue (and she may have leave to do so now) and bring a fresh action. Otherwise the motion is dismissed with costs to defendants in the cause.

CARTWRIGHT, MASTER. APRIL 18TH, 1907.

CHAMBERS.

HAYS v. ROADE.

Summary Judgment—Rule 603 — Promissory Notes—Purchase of Patent Right—R. S. C. 1906 ch. 119—Defective Patterns—Plausible Defence—Leave to Defend.

Motion by plaintiff for summary judgment in an action on promissory notes aggregating over $1,000, given for the purchase of a patent right, and so noted on their face, as required by R. S. C. 1906 ch. 119, sec. 14.

W. C. MacKay, for plaintiff.

J. T. Loftus, for defendants.

THE MASTER:—It is admitted that before taking these notes plaintiff saw defendants about them, when a solicitor, Mr. Milne, who was a trustee for the parties pending the completion of the transaction, was present. Plaintiff says he was informed by them that as soon as the patent was issued all things would have happened to make the notes payable, and that they had no doubt but that the notes would be met at maturity.

These defendants in answer say that at this interview they told plaintiff that the pattern sent them was defective and useless for the purpose for which it was intended, and that they asked him not to take the notes on that account.

Mr. Milne makes a short affidavit that "this statement is true in substance and in fact, as (the defendant) Roade informed the plaintiff on the said occasion that the said pattern was defective and useless for the purpose for which it was intended . . . and the said Roade requested plaintiff not to take over the notes on that account." Mr. Milne has not been cross-examined, and, if the matter had rested here, no

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doubt the motion must fail under the case of Jacobs v. Booth's Distillery Co., 85 L. T. R. 262, in the House of Lords. But plaintiff notified defendants by letter of 29th August that he had become the holder of these notes. And defendant Roade on his cross-examination admits: (1) that, although frequently writing to plaintiff prior to 4th October, he made no complaint about the patterns; and (2) frequently promised to pay these notes, as the letters produced shew. It was only after long delay and many ineffectual attempts to obtain payment that this action was commenced on 4th February.

It was admitted that the cross-examination of Roade should be taken as that of his co-defendant Thompson also.

By sec. 15 of R. S. C. 1906 ch. 119, plaintiff took these notes subject to any defence or set-off in respect of them which would have existed between the original parties. The assignment to plaintiff of the defendants' contract and notes is for the sum of $1 only. The original contract is dated 30th April, 1906, and contains no warranty of the usefulness of the proposed patent.

Defendants wish to rely on a letter of plaintiff's agents of 27th February, 1906, in which they say: "We will make a perfect machine and furnish all dies and patterns to make the machine along with the rights for the price given."

It is quite clear that defendants supposed that the furnishing of the necessary dies and patterns was part of the agreement; and it is pretty certain that there was great delay in getting patterns that would work.

That this was the contention of defendants is established by the evidence of Mr. Milne, an entirely disinterested witness, who corroborates the evidence of Roade as to what was said to plaintiff. Unless the mention of the patterns being defective was intended to be notice to plaintiff of defendants' position, it is difficult to see why this fact was mentioned. It is true that plaintiff denies it. But at present at least the well established rule must be applied, and it must be supposed that plaintiff has forgotten it. He naturally would not attach so much importance to this part of the conversation as the defendants.

From all this it may be not unlikely that defendants will ask to have the agreement rectified. They also are asserting a large counterclaim for damages occasioned by the defective patterns.

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Mr. MacKay is perhaps right in thinking that defendants will have great difficulty in getting any amendment of the agreement, and that the damages sought to be claimed would be too remote.

These, however, are sufficiently plausible to be carefully considered before refusing defendants an opportunity of having them disposed of at a trial.

Now in the present case the following are undoubted facts:—

1. The notes in question are subject to any defence or set-off which would have existed between the original parties.

2. The letter of 27th February, 1906, undertook that plaintiff's assignors would furnish all dies and patterns to make a perfect machine for the price given.

3. By the testimony of an independent witness it appears that plaintiff before taking the notes was notified that patterns supplied were defective, and was asked on that account not to take the notes.

4. Afterwards the plaintiff, for a nominal consideration, took an assignment from the patentees, who live out of the jurisdiction. In this way defendants are prevented, on this motion at least, from getting any evidence from their assignors on the important point whether the patterns were not to be supplied as said in the letter, though not in the agreement.

5. It is clear that the patterns were not such as were necessary to make a perfect machine, from which a right to damages may accrue to defendants.

In view of the foregoing, the motion must be dismissed with costs in the cause. But defendants should in every way possible facilitate the speedy trial of the action.

I have not overlooked the fact of the correspondence and of the apparent admissions of defendants of their liability on the notes.

I think, however, that they are not on that account to be precluded from a trial. These are just the statements that are made by persons who are full of hope that matters will yet come right, and who are anxious to carry out anything which they have undertaken, even though they may not be legally liable to do so.

The expressions in the defendants' letters may not unfairly be viewed as made subject to the intimation given to plaintiff at the interview before he took the notes. The

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real point in controversy is whether the defendants were liable on these notes, and, as I understand the rule as applied to the special facts of this case, they should have the opportunity of at least submitting their statement of defence to the Court.

ANGLIN, J. APRIL 18TH, 1907.

CHAMBERS.

RE DOWD, A LUNATIC.

Lunatic — Sale of Land for Maintenance of — Annuity Charged thereon—Disposition of Purchase Money—Sale Freed from Annuity—Payment into Court—Mortgage.

Application by the committee of a lunatic for a direction that the purchase money of certain real property of the lunatic, which had been sold, should be paid into Court.

J. E. Jones, for the committee.

J. F. Edgar, for the inspector of prisons and public charities.

Grayson Smith, for the purchaser.

ANGLIN, J.:—The purchase price of the property is $7,500. Against it there are certain mortgage incumbrances and charges by way of execution, etc., amounting approximately to $4,300. Costs are also to be provided for. Moreover, one Johanna Dowd, aged 77 years, is entitled to an annuity of $110 a year, which is charged upon the property. Though notified, the annuitant does not appear, and it is stated that she will not consent to the property being sold freed from the charge in her favour unless she is paid . . . $1,000. It is stated that an annuity of $110 can be purchased for her from a first-class insurance company for about $700. The purchaser objects to take the property unless he receives title freed from this annuity. The inspector objects to payment of $1,000 for a release of the annuity, on the ground that this sum is excessive.

The annuity of Johanna Boyd is an incumbrance, and by sec. 15 of R. S. O. 1897 ch. 119, the Court is empowered to

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"direct or allow payment into Court in case of an annual sum charged on the land . . . of such amount as, when invested in securities approved by the Court, the Court considers will be sufficient, by means of the dividends thereof, to keep down or otherwise provide for that charge," and thereupon, after or without notice to the incumbrancer, as the Court thinks fit, to declare the land to be freed from the incumbrance, and to give directions for the retention and investment of the money in Court.

If, after satisfying the mortgages and executions standing against the property in question, the purchaser would execute a statutory mortgage in favour of the committee and the Accountant of the Supreme Court, for the balance of the purchase money, bearing interest at 5 per cent., such interest should more than suffice to pay the annuity. But, if there is any difficulty in so arranging, rather than submit to the demand of the annuitant for immediate payment of $1,000 as a condition of releasing her annuity, it would be, I think, in the interest of the lunatic that the entire balance of the purchase money, after paying all mortgages and executions, should be deposited in Court to the credit of this matter, and the annuity paid, so long as Johanna Dowd survives, out of the fund thus created, principal as well as income. In order to comply with the provisions of sec. 15, the Accountant could probably find an investment for this money which would enable him to realize upon it 4½ or 4 per cent. In that way the income alone should be sufficient to meet the annual charge of the annuity.

An order may therefore issue declaring the land freed from the annuity, upon payment into Court of the balance of the purchase money after satisfaction of the mortgages and executions affecting the land, or upon the execution by the purchaser of a statutory mortgage of the lands in favour of the committee and the Accountant of the Supreme Court jointly to secure payment of such balance, bearing interest at a rate sufficient to produce an annual net return of not less than $120. The order will also provide for payment by the Accountant to Johanna Dowd of her annuity out of the interest upon such mortgage, or, if the money be paid into Court, out of the fund, principal as well as interest.

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APRIL 18TH, 1907.

DIVISIONAL COURT.

ATTWOOD v. PETT.

Bankruptcy and Insolvency—Assignments and Preferences—Action by Assignee for Benefit of Creditors of Insolvent Trader to Set aside Conveyances to Trader's Wife—Misstatement of Consideration—Conveyances for Value—Absence of Intent to Defraud—Action Brought after Expiry of Statutory Period—Evidence—Costs.

Appeal by plaintiff from judgment of MAGEE, J., ante 173, dismissing action without costs.

A. Shaw, K.C., for plaintiff.

J. H. Spence, for defendants.

THE COURT (FALCONBRIDGE, C.J., BRITTON, J., RIDDELL, J.), dismissed the appeal with costs.

APRIL 18TH, 1907.

DIVISIONAL COURT.

PETT v. ATTWODD.

Bankruptcy and Insolvency—Assignments and Preferences—Assignment by Insolvent Trader for Benefit of Creditors—Claim of Wife of Insolvent to Rank on Estate—Transactions between Husband and Wife—Price of Land Conveyed by Wife—Money Lent—Interest—Costs.

Appeal by defendant from judgment of MAGEE, J., ante 178.

A. Shaw, K.C., for defendant.

J. H. Spence, for plaintiff.

THE COURT (FALCONBRIDGE, C.J., BRITTON, J., RIDDELL, J.), dismissed the appeal with costs.

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BRITTON, J. APRIL 19TH, 1907.

TRIAL.

MILLOY v. WELLINGTON.

Husband and Wife—Criminal Conversation—Death of Plaintiff—Survival of Cause of Action—Damages—Costs.

Action for criminal conversation, tried with a special jury at Toronto. This was the second trial of the action. At the first trial the plaintiff obtained a verdict for $5,000: 3 O. W. R. 561. A new trial was ordered by a Divisional Court: 4 O. W. R. 82, 8 O. L. R. 308; and this was affirmed by the Court of Appeal: 7 O. W. R. 862, 12 O. L. R. 24. The original plaintiff died on 27th April, 1905, and an order was made reviving the action in the name of the administrator of his estate, which order the Master in Chambers refused to set aside: 6 O. W. R. 437, 10 O. L. R. 641.

On the second trial the jury found for plaintiff with $500 damages.

W. R. Smyth, for plaintiff.

I. F. Hellmuth, K.C., for defendant.

BRITTON, J.:—On motion for judgment counsel for defendant contended: (1) that the cause of action did not survive, and that the action should not have been continued in the name of the personal representative of the deceased plaintiff; (2) that judgment should in any event be for no more than nominal damages; (3) that no other or different order as to the costs of the first trial and of the appeal to a Divisional Court should be made than that made by the Divisional Court.

In my opinion, the first and second objections cannot prevail. Letters of administration to the estate of the deceased plaintiff were taken out by his brother, the present plaintiff, who obtained on præcipe an order in the High Court directing the action to proceed in his name as plaintiff by revivor. Defendant attempted to have this order set aside; the matter was fully considered by the Master on the merits, as well as upon technical objections urged, and the order was maintained: 10 O. L. R. 641, 6 O. W. R. 437.

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As to damages, it cannot be said that plaintiff is entitled to only nominal damages. If plaintiff, as administrator, has, by revivor, any right to continue the action, then he can do so "in the same manner and with the same rights and remedies as the deceased would, if living, have been entitled to do:" see R. S. O. 1897 ch. 129, sec. 10. The question of damages was fully discussed by Meredith, C.J., in this case, 8 O. L. R. 308, 4 O. W. R. 82, and in appeal by Osler, J.A., 12 O. L. R. at p. 25, 7 O. W. R. 862. The verdict cannot be interfered with.

The disposition of the costs of the motion to the Divisional Court for a new trial, and of the former trial of this action, as made by the Divisional Court, is to stand, as I do not "otherwise order."

Judgment for plaintiff for $500 damages with all costs of action and of last trial and of all interlocutory proceedings, except as otherwise ordered.

APRIL 19TH, 1907.

DIVISIONAL COURT.

REX v. HOLMES.

Police Magistrate—Jurisdiction—Appointment for Town—Power to Convict for Offence Committed in another Town for which there is a Police Magistrate—Ex Officio Justice of the Peace—Act respecting Police Magistrates—Interpretation of—Quashing Conviction—Protection of Justices—Costs against Informant—Undertaking.

Motion by defendant to make absolute a rule nisi to quash his conviction for an offence against the Liquor License Act.

The motion was heard by MULOCK, C.J., ANGLIN, J., MAGEE, J.

Frank McCarthy, for defendant.

J. R. Cartwright, K.C., for the Crown.

ANGLIN, J.:—The defendant moves to quash his conviction by William Church, justice of the peace in and for the

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county of Essex, and W. B. Beaman, police magistrate for the town of Essex, upon information charging that he (the defendant) "at the town of Amherstburg, in the county of Essex, did not keep the bar-room in his licensed premises closed during prohibited hours, as required by sec. 56 of the Liquor License Act, as amended by ch. 47, Ontario statutes, 1906, and unlawfully allowed or suffered persons in said bar-room during prohibited hours, namely, on Sunday the 19th day of August, 1906."

Mr. Beaman does not seem to have intended to act as police magistrate in this case. He signs the conviction and other papers returned as "J. P., Essex Co." It is from the order granting the writ of certiorari that we learn that he is police magistrate for the town of Essex.

Several objections taken by counsel for the defendant to the sufficiency of the evidence upon which the conviction was founded, cannot, in our opinion, be sustained. A formidable objection is raised, however, to the jurisdiction of the convicting magistrates.

The offence charged was committed in the town of Amherstburg, where the defendant resides, and for that town there is a police magistrate.

Section 7 of the Act respecting Police Magistrates, R. S. O. 1897 ch. 87, is in these words: "No justice of the peace shall admit to bail or discharge a prisoner or adjudicate upon or otherwise act in any case for a town or city where there is a police magistrate, except at the Court of General Sessions of the Peace, or in the case of the illness, absence, or at the request of the police magistrate."

It is admitted that the police magistrate for Amherstburg was not ill or absent and did not request the convicting justices to act in his stead.

Counsel for the defendant contends that this statutory provision excluded the jurisdiction of the magistrates who tried this case. As to Mr. Church—a justice of the peace for the county of Essex—Mr. Cartwright concedes that the objection is well taken. But he maintains that, as police magistrate for the town of Essex, the jurisdiction of Mr. Beaman extends over the entire county, including the town of Amherstburg, and that as police magistrate Mr. Beaman is not within the prohibition imposed by sec. 7.

Though the language of sec. 7 is not, perhaps, as clear as might have been expected, I think it is sufficiently plain that the words "any case for a town or city" include at

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least any case arising out of an offence committed in such town or city by offenders found within its limits. This was the view taken by the late Mr. Justice Rose in Regina v. Riley, 12 P. R. 98. The language of the succeeding section of the statute puts it beyond doubt, I think, that such is the proper construction of sec. 7. Section 8 is as follows: "Nothing in the preceding sections contained shall interfere with the jurisdiction of justices of the peace for the county in which a town having no police magistrate is situate, over offences commited in the town." Excepting the provision in sec. 7 there is nothing in the preceding sections of the statute which could possibly be deemed to affect the jurisdiction of justices of the peace for the county over offences committed in towns situate within such county.

But Mr. Cartwright maintains that the prohibition of sec. 7 does not apply to Mr. Beaman, because he is in fact a police magistrate, though he is as such ex officio a justice of the peace for the entire county (sec. 27), because he is not a justice of the peace by commission appointing him to that office; and he relies upon the decision of the Court of Appeal in Hunt v. Shaver, 22 A. R. 202, and the opinion of Britton, J., a member of the Divisional Court which decided Rex v. Spellman, 13 O. L. R. 43, 8 O. W. R. 700. The learned counsel deems it unimportant that Mr. Beaman did not profess to sit as police magistrate.

In Shaver v. Hunt it was held that a police magistrate, though ex officio a justice of the peace, is not obliged to make returns to the clerk of the peace of convictions made by him without the limits of the particular city or town for which his commission appoints him police magistrate. This decision turned upon the special language of what was then sec. 6 of R. S. O. 1887 ch. 77 (now R. S. O. 1897 ch. 94, sec. 6), which was held to confer a personal and individual exemption from the obligation to make such returns upon a police magistrate, even when he exercises functions, jurisdiction to perform which depends upon the provision giving him status as an ex officio justice of the peace beyond the immediate territory for which he is commissioned as police magistrate.

In Rex v. Spellman the Court held that the jurisdiction of a police magistrate for the county of Peterborough was not superseded by the appointment of another police magistrate for that county, whose commission did not appoint him "in place and stead" of the former magistrate. It is con-

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tended that Mr. Justice Britton expresses the opinion that a police magistrate for a city or town has jurisdiction as a police magistrate throughout the entire county in which such city or town is situate. If such be the purport of what Mr. Justice Britton has said in that case, his expression of opinion is entirely obiter, and with it I am, with great respect, unable to agree.

Section 30 of the statute is as follows: "A police magistrate sitting as such shall have full power to do whatever is authorized by any statute in force in this province relating to matters within the legislative authority of the legislature of the province, to be done by two or more justices of the peace; and every police magistrate shall have such power while acting anywhere within the county for which he is ex officio a justice of the peace."

If the police magistrate for a town or city sits or may sit as such at any place in the county within which such town or city is situate, it is manifest that the last clause of this section is entirely unnecessary. The prior portion of the section would in that case confer upon him the power of two or more justices of the peace wherever he should hold court within the county. It must be because the police magistrate can only sit as such within the limits of the territory for which he is appointed that the second clause of the section is requisite, to enable him, when sitting elsewhere in the county, by virtue of his ex officio status as a justice of the peace, to exercise the powers of two or more justices of the peace, though not then sitting as police magistrate. When sitting elsewhere than in the city or town for which he is police magistrate, though not divested of his individuality as a police magistrate, and in fact exercising jurisdiction because he is a police magistrate and therefore ex officio a justice of the peace for the county, his powers and jurisdiction are merely those of two or more justices of the peace; and what two or more justices of the peace are not authorized to do, he may not do. If a police magistrate for a city or town were empowered to sit as and to exercise the functions and jurisdiction of a police magistrate throughout the entire county in which such city or town is situate, though his commission should purport to appoint him police magistrate for the city or town only, it would in fact make him police magistrate for the county and every part of it. This cannot have been intended, and.

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I am satisfied, is not the effect of the statutory extension of his jurisdiction as a justice of the peace.

By virtue of secs. 17 and 30, as police magistrate for the town of Essex, Mr. Beaman had jurisdiction over offences committed in any part of the county of Essex for which there is no police magistrate: Regina v. Gully, 21 O. R. 219. To such cases sec. 7 has no application. In regard to the trial by one police magistrate of offences committed within the territorial jurisdiction of another, Regina v. Gully is not an authority.

But in the present case Mr. Beaman sat in the town of Essex, for which he is police magistrate, and sitting there, it is urged for the Crown, he might exercise his plenary powers as police magistrate in respect of any case brought before him for trial if it originated anywhere within the county of Essex. As police magistrate he had clear and exclusive jurisdiction to try persons charged with having committed offences within the town of Essex, and it may be also, as suggested by Rose, J., in Regina v. Riley, 12 P. R. at p. 104, to try persons found within the town who are charged before him with having committed offences elsewhere within the county. But here the offence is charged as having been committed in Amherstburg, and the defendant is stated in the information and conviction to be a resident of Amherstburg. It is nowhere suggested that he was found or apprehended in the town of Essex, and that fact, if it could confer jurisdiction on Mr. Beaman (which I gravely doubt) cannot be fairly assumed against defendant; it should appear on the face of the proceedings. But the fact (which does so appear) that Mr. Beaman purported to act as a justice of the peace and not as a police magistrate perhaps indicates that defendant had not been found or apprehended in the town of Essex. At all events it is apparent that the magistrate recognized that his jurisdiction to deal with the case depended upon his ex officio status as a justice of the peace for the county. In this I think he was well advised. As police magistrate for the town of Essex, apart from his ex officio character as justice of the peace for the county, I think he had no jurisdiction to try the charge against defendant.

Section 35 of the Act respecting police magistrates is in these terms: "No police magistrate need act in any case arising outside of the limits of the city, town, or place for which he is police magistrate, unless he sees fit to do so."

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This provision implies that in cases arising within the limits of such city, town, or place he is obliged to act; and, further, that in such cases he has a jurisdiction prior to and exclusive of that of other magistrates, whose jurisdiction is as to such cases limited or suspended. Were this not so, as pointed out by Rose, J., in Regina v. Riley, 12 P. R. at p. 104, "unseemly squabbling between magistrates having concurrent jurisdiction" would be not merely a possible but a probable result. The true interpretation of sec. 7 of the Act respecting police magistrates is, I think, to vest in the police magistrate for a city or town prior and exclusive jurisdiction over all cases "for the town or city" which are within his cognizance as such magistrate. In such cases other police magistrates in the same county have only the jurisdiction of justices of the peace for the county, and, except in the special circumstances enumerated in sec. 7, that jurisdiction is supended in favour of the prior jurisdiction of the police magistrate for the town or city where the case is localized: Rex. v. Duering, 2 O. L. R. 593.

In my opinion, the only jurisdiction which Mr. Beaman had in this case was that conferred upon him by secs. 27 and 30 of the Act respecting police magistrates, namely, the powers and jurisdiction of a justice of the peace or of two or more justices of the peace for the county of Essex. He may also have had a commission as a justice of the peace. It is not material whether he had or had not. Section 7 of the statute, excluding the right of any justice of the peace to "adjudicate or otherwise act in any case for a town or city where there is a police magistrate," was intended to and did in fact prohibit both Mr. Beaman and Mr. Church from acting in a case such as this.

The conviction should, therefore, be quashed. There will be the usual order protecting the justices and any officer who may have acted under their authority. If defendant will undertake not institute any civil action against the informant, he should have his costs of these proceedings against the informant. Unless he is prepared to give such undertaking, however, there will be no order as to costs.

MULOCK, C.J., concurred.

MAGEE, J., dissented, for reasons stated in writing. He felt bound by Hunt v. Shaver, 22 A. R. 202, and Rex v. Spellman, 13 O. L. R. 43, to hold that Mr. Beaman had jurisdiction.

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APRIL 19TH, 1907.

DIVISIONAL COURT.

DUNN v. McCALLUM.

Mechanics' Liens—Lis Pendens—Lien of Material Man—One Claim against Lands of three Separate Owners—Amendment.

Appeals by defendants John Deavitt, Hannah Ross, and Mary E. Elphick, from order of FALCONBRIDGE, C.J., ante 315, reversing order of Master in Chambers, ante 33, vacating the registry of a certificate of lis pendens against the lands of the three appellants, who each owned a separate piece of land.

The appeal was heard by MULOCK, C.J., ANGLIN, J., MAGEE, J.

W. E. Middleton, for defendant Deavitt.

E. A. Forster, for defendants Ross and Elphick.

J. Bicknell, K.C,, for plaintiff.

MULOCK, C.J.:—This action is brought under the Mechanics and Wage-Earners' Lien Act, by William Dunn against the defendants McCallum and Campbell, contractors, and John Deavitt, Hannah Ross, and Mary E. Elphick, the owners of certain lands, for a declaration that the plaintiff is entitled to a lien on the said lands in respect of moneys owing for materials supplied to construct and use in the erection of buildings on the said lands.

In his statement of claim the plaintiff alleges that the defendants Deavitt, Ross, and Elphick were the owners of the lands in question, and entered into a contract with their co-defendants, McCallum and Campbell, for the carpenter and other work on the buildings erected or being erected on the said lands, and that the plaintiff, at the request of the contractors, supplied certain materials for the erection of said buildings erected or being erected on behalf of the defendants Deavitt, Ross, and Elphick on the said lands to the amount of $280.86, which materials were incorporated therein. The plaintiff's claim is thus presented as one undivided claim for the sum of $280.86 against the lands

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owned by three defendants, Deavitt, Ross, and Elphick, together and not in severalty, and as arising under one contract entered into by these three persons and not under three separate contracts.

After statement of claim filed, the Master in Chambers, on motion by the defendants Deavitt, Ross, and Elphick, the appellants, ordered that the claim of lien registered in the registry office be vacated and set aside. On appeal, the Chief Justice of the King's Bench overruled the Master and directed the registration to be restored. From this latter decision the defendants, Deavitt, Ross, and Elphick now appeal. . . .

In support of their appeal, the appellants allege that they were not jointly parties to any contract with the contractors, McCallum and Campbell, as in the statement of claim alleged, for the erection of any building; that they had no joint interest in the lands in question, but, on the contrary, that each owned a portion thereof in severalty, and that the materials were supplied to each one in respect of his separate land under a separate contract between the contractors and himself alone, and therefore contend that the claim of lien registered is invalid, and its registration should be vacated.

The corectness of the appellants' allegations was shewn by affidavits filed on the original motion before the Master, and was conceded by plaintiff's counsel during the argument before us. There thus being no dispute as to the facts, the question is whether the plaintiff is entitled to maintain this action against all or any of the three owners. His cause of action is wholly statutory, and is enforceable only in manner provided by the statute.

By sub-sec 1 of sec 2, "contractor" means "a person contracting with . . . the owner . . for . . . furnishing materials for any of the purposes mentioned in this Act;" and by sub-sec. 3 of sec. 2, the word "owner" means "any person. . . having any estate . . . in the lands upon or in respect of which . . . the materials are . . . furnished, at whose request, and upon whose credit, or upon whose behalf, or with whose privity or consent, or for whose benefit any such . . . materials . . . are furnished."

Section 4 defines the nature of the lien. It enacts that "any person who . . . furnishes any materials to be used in the making, constructing, etc. . . . of any build-

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ing, etc. . . . for any owner, contractor, or sub-contractor, shall, by virtue thereof, have a lien for the price of such . . . materials upon the erection, building, etc. . . . and the lands occupied thereby, or enjoyed therewith . . . or upon such materials are placed or furnished, to be limited however in amount to the sum justly due to the person entitled to the lien and to the sum justly owing (except as herein provided) by the owner."

And sub-sec. 1 of sec. 7 declares that "the lien shall attach upon the estate or interest of the owner as defined by this Act in the erection, building, etc. . . . upon or in respect of the . . . materials placed or furnished to be used, and the lands occupied thereby or enjoyed therewith."

It appears to me that the clear meaning of these sections is that a lien under the Act, in respect of materials furnished, attaches only to the erection, building, etc., in respect of which they were furnished, and to the lands occupied thereby or enjoyed therewith, or upon which the materials are placed or furnished to be used, and then only when furnished for the "owner" (that is, the owner as defined by sub-sec. 3 of sec. 2 and not some other owner) or for the "contractor" (that is, one who has contracted with the said "owner"), or a sub-contractor.

In the present case there are three separate properties owned by three separate persons, each of whom entered into a separate contract with the contractors for the erection of a house on his own separate property, but was no party to the other two contracts, and the plaintiff claims a lien on each property for the materials furnished for it and also the other two properties. There being no community of interests between the three owners in respect of the lands, and no common contractual relations of any kind between themselves or between them and the contractors in respect of the three different houses erected for them respectively by the contractors, it is obvious that each property cannot be chargeable with the plaintiff's entire claim. The Act does not give a lien upon property owned by one person for materials furnished in respect of another property owned by another person.

The plaintiff seeks to meet this objection by the contention that at most it is only a case of claiming too much as against each property, and that when the true amount of the lien as against each property is ascertained, his total claim

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can be correspondingly apportioned. If this were the correct interpretation of his cause of action, it would be a good answer to this appeal, for the statute being equitable in its nature should be liberally interpreted, in order that its purpose should not be defeated. But I am unable to thus view the objection.

The cause of action is a statutory one, and in order to maintain it the plaintiff must shew a cause of action coming within the provisions of the statute.

Assuming that the plaintiff was entitled to three separate liens in respect of three separate properties, was he entitled under the statute to consolidate the three separate amounts owing him, into one claim, and thus by means of his registered claim of lien or lis pendens create a registered incumbrance for the total amount against each property?

Sections 17 and 18, I think, answer this question. Sub-section 1 of sec. 17 authorizes the registration of a claim of lien, and declares that it shall set out: (a) "the name and residence of the person claiming the lien and of the owner of the property to be charged," etc.; (c) "the sum of the claim as due or to become due;" (d) "a description of the lands to be charged," etc. And sub-sec. 2 of sec. 17 says "that the claim shall be verified by the affidavit of the person claiming the lien, or of the agent or assignee having a personal knowledge of the matters required to be verified," etc. By form 4 to the schedule, being the form of this affidavit, the person making the affidavit is to swear that "the said claim, so far as it relates to me, is true." Then sec. 18 declares that if more than one lien is included in one claim, each lien shall be verified as required by sec. 17.

These provisions of secs. 17 and 18 shew that each lien must be treated separately. It cannot be conceived that the legislature contemplated any other course, for it would be manifestly unjust to allow one man's property to be incumbered, even temporarily, with an alleged incumbrance with which it was not lawfully chargeable. Section 20 enacts that "the registrar, upon payment of his fee, shall register the claim so that the same may appear as an incumbrance against the lands therein described." And sec. 21 enacts that "where a claim is so registered the person entitled to a lien shall be deemed a purchaser pro tanto," etc.

These two sections must be construed as meaning that each parcel of land shall be deemed as incumbered only in

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respect of the lien with which it is properly chargeable. Obviously it was considered that each owner should be in a position at any moment to remove the incumbrance by payment of the true amount of the lien, which he would be unable to do if it were permitted to consolidate liens, as has been here attempted to be done.

The statute does not create any such lien as is set forth either in the registered claim of lien or in the plaintiff's statement of claim, and I therefore think the registered claim of lien is a nullity, and as such cannot be validated by the application of the curative provisions of sec. 19. Moreover, even if the statement of claim were capable of amendment, this would not, I think, be a proper case for applying the provisions of sec. 19.. The plaintiff has caused the illegal registration of a cloud against the title to the lands of the three defendants, and apparently without having taken the trouble, before doing so, to avail himself of the provisions of sec. 29, whereby a lien-holder may inform himself as to the facts.

The plaintiff's counsel also argued that, irrespective of the claim of lien, he was entitled to maintain this action because of his having commenced it within sufficient time and registered a certificate of action, but his statement of claim is, I think, open to the same objection as the claim of lien, and must share the same fate. He was bound to have set forth in his statement of claim a cause of action applicable to his rights. This he has not done, and he is no more entitled to amend his statement of claim than he would be to amend his claim of lien. It cannot be that the statute contemplated the plaintiff's rights being different, whether his lien was preserved by the registration of a claim of lien or of a lis pendens.

It was also urged upon us that the whole claim might at the trial be found as owing in respect of one property, and that the action might then be dismissed as against the others, and that the Court should not on an interlocutory motion finally adjudicate upon a matter which constitutes the very foundation of the plaintiff's cause of action.

If the plaintiff had only misjoined in this action three separate causes of action against three different persons, it might be proper to allow him to amend or to continue the action to the trial, if any useful purpose was to be served, but at the trial the invalidity of the claim of lien would be

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a bar to any relief against any one of the three owners, and therefore he cannot be prejudiced by an earlier termination of his action. Doubtless sub-secs. 2 and 3 of sec. 27 of the Act were intended to meet just such a case as the present one in order that the owner of lands might at an early moment secure the removal from his registered title of a cloud improperly placed upon it. I therefore think this appeal should be allowed with costs.

If the plaintiff desires it, he should be permitted to include in the order on this appeal a direction dismissing this action with costs.

ANGLIN, J., concurred.

MAGEE, J., was of opinion, for reasons stated in writing, that the appeal should be allowed, with leave, however, to the plaintiff to amend.

RIDDELL, J. APRIL 20TH, 1907.

CHAMBERS.

SCAMAN v. PERRY.

Venue—Motion to Change—Preponderance of Convenience—Witnesses—Place for Trial—Terms as to Expenses.

Appeal by plaintiff from order of Master in Chambers, ante 537, changing the venue from Toronto to Sault Ste. Marie, upon terms.

D. Henderson, for plaintiff.

Grayson Smith, for defendant.

RIDDELL, J., dismissed the appeal with costs to defendant in any event.

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FRALECK, JUN. CO. C.J. MARCH 30TH, 1907.

HASTINGS SESSIONS.

REX v. H. CORBY DISTILLERY CO.

Alien Labour Act—Convictions of Distillery Company for Importation of Alien Workmen — Previous Contract— "Citizen"—"Resident"—Skilled Workmen — New Industry—Quashing Convictions—Costs.

Appeal by defendants from 11 convictions made by the police magistrate for the city of Belleville under the Alien Labour Act, R. S. C. 1906 ch. 97.

W. B. Northrup, K.C., for defendants.

E. G. Porter, Belleville, for George S. Johnson, the informant.

FRALECK, Jun. Co. C.J.:—Section 2 of the Act reads as follows: "It shall be unlawful for any person, company, partnership, or corporation in any manner to prepay the transportation or immigration of any alien or foreigner into Canada under contract or agreement, parole or special, expressed or implied, made previous to the importation or immigration of such alien or foreigner, to perform labour or service of any kind in Canada."

And sec. 3: "For every violation of any of the provisions of the last preceding section the person, partnership, company, or corporation . . . shall forfeit and pay a sum not exceeding $1,000 and not less than $50."

Having regard to the cases in hand, the first endeavour is to find out the meaning and intent of the statute in order to determine whether the defendants' acts, or any of them, fall within the restrictions imposed.

First, there must be an agreement made previous to the importation or immigration, or to assist, encourage, or solicit the same, or to pay the transportation.

It will be important to consider the case of an alien coming into this country unsolicited, of his own accord, seeking employment here, and upon his arrival entering into the employment of a private party or a corporation.

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I am of the opinion that it is not the intention of the statute to include such a case within its prescriptions. The whole tenor of the Act is to the contrary. Section 7 provides that all contracts or agreements made previous to the immigration or importation shall be void.

Again, sec. 8 provides a penalty for any master of a vessel who knowingly brings into this country any alien who previous to embarkation on such vessel had entered into a contract to perform work in this country.

Still further, sec. 12 makes it unlawful to promise employment through advertisements published in such foreign country, and any person coming into this country in consequence of such, shall be treated as coming under a contract as contemplated by the Act. Now what contract is here referred to? It seems clearly to me the contract mentioned in sec. 2, "made previous to the importation or immigration" of such alien.

It will be noted that in every case where the word "agreement" occurs but one, it plainly mentions or refers to an agreement "made previous to the importation or immigration." Indeed if this were not the intention of the statute, then sec. 2 would appear to be meaningless.

Section 3 is copied verbatim from the United States Act. It seems to me that this section, from the foregoing, is not intended to create an offence distinct from that of sec. 2. If, on the contrary, a separate offence is established, how are we to construe the words "citizen," "resident"?

There is no other legal definition for the word "citizen" in this country except if it be applied to a person comprised in an urban population. In any other respect the words "British citizen" or "Canadian citizen" would be meaningless. If citizen is construed to mean British subject, then an alien must reside in this country a term of years sufficient to qualify him to become a British subject before any one could engage him to perform any kind of labour. So likewise with "resident." Clearly it is not the intention of the statute to require an alien to take up his abode and live in this country for a period of time long enough to comply with the legal definition of residents. Moreover, should the term "citizen" or "resident" be thus applied to aliens, it would be inimical to the promotion of immigration and contrary to sec. 15 of the Act.

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Then as to "skilled labour;" "ski
knowledge united with the dexterity to
of work as it ought to be done. A skill
the very highest class of workmen.

Sub-section (c) of sec. 9 states: "
shall be construed to prevent any perso
from engaging under contract or agree
in foreign countries to perform labour
that skilled labour for that purpose ca
tained."

"Otherwise obtained," it was conte
prosecution, meant anywhere and in an
sub-sec. 2 of sec. 12 has been overlooked
section shall not apply to skilled labo
Canada as hereinbefore specified, upo
not at present established in Canada."

It was contended by counsel for the
business of the defendants has been s
Canada as to become a matter of judicia
or reference. Ship building has been
days of King Solomon. But the bui
triremes was a different industry to tha
caravels, and the building of the latter
dustry to that of the modern ironclad
hound.

Distilling has been known and a p
centuries, but the manufacture of spirit
tillery is a different industry to that o
of the mountains of Kentucky, or the m
dew" amongst the hills of Kerry. It
life of the distillery is only about 15 ye
ances must be again renewed.

The defendants purchased this plan
for a very large sum—about $1,000,0
pended this large sum they determined
newest process and appliances. They
Angelo Meyers, of Philadelphia, an exp
and, as the result of this consultation, t
in a new process altogether, whereby mo
could be obtained from a given amou
This process was within the last year o
used only in three distilleries in the

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this a large expenditure was required, one witness stated from $150,000 to $200,000, and it is not denied that the work in installing the plant, which the defendants introduced into their distillery, called for workmen of the very highest order.

It has been found by the magistrate and admitted by the prosecution, that Cohen and Matthews were both engaged in this country, Matthews in the defendants' office in Belleville, and Cohen in Corbyville. Now Isadore Cohen and W. Matthews came to this country of their own accord. not knowing whether they would be engaged or not. Cohen was in Omaha and received word from his uncle, Angelo Meyers, that a distiller was required at Corbyville. By Meyers's advice he went first to see Mr. M. B. Davis in Montreal, and then came on to Belleville. He takes up his residence at Corbyville for a week or so to look over the distillery and see if the place suited him, and was finally employed to take charge of the work. It is not suggested by the prosecution that any one in Canada was qualified to take Cohen's place. On the contrary, Mr. Taylor had been distiller for the Corbys for 30 years. When he saw the new process being installed he refused to undertake the management and resigned. If Mr. Taylor, with his 30 years' experience, could not manage this plant, where else in Canada could the defendants find a man competent to do so?

Matthews hears through Henry Cohen, who had visited his brother here, that the defendants required a "bottler." He came of his own accord to the defendants' office in Belleville, and there the defendants engaged him. After these two men had been engaged, and some time after they had commenced work, they represented to the defendants that it was customary in such cases for employers in this business to pay travelling expenses. The defendants did so, not as an obligation, but simply as a gratuity. The two men did not come into this country with an understanding or promise that their travelling expenses should be paid. I do not think these payments constituted an offence within the meaning of the Act.

Matthews remained a short time, but left, alleging that the place was too small and did not afford opportunities of educating his children.

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I am of the opinion that the appeal in the case of Isadore Cohen and in that of W. Matthews should be allowed with costs and the convictions in these cases be set aside.

It appears that a committee of three, consisting of E. H. Davis, J. H. Stockton, and A. I. Bird, manage the defendant company. To this committee is relegated the power to make contracts on behalf of the company and to generally manage the same. A millwright was required, and Cohen spoke to Mr. Davis about hiring a Mr. Hiett, an experienced millwright of Peoria, Illinois. Cohen wires Hiett as follows: "Can you come immediately to take charge millwright work. Wire reply, stating terms, care H. Corby Distillery Co." To this Hiett replies: "Will come, $6 a day and expenses." Cohen replies: "Terms satisfactory. Come immediately. Wire when leaving." Upon this Hiett comes direct to Corbyville, and goes to work. No other hiring took place. He was paid the wages he asked and his expenses. Hiett stated in the evidence that a millwright to perform this work would require a knowledge of brass work as well. He also stated that this was his first experience with a plant like that which the defendants had installed. I think the hiring of Hiett a violation of the provisions of the Act and dismiss the appeal in his case with costs. The defendants accepted Cohen's telegrams as an engagement.

The Ansonia Copper and Brass Co. is a very large company of coppersmiths. This company have a large number of men in their employ, who are expert coppersmiths. This company alone possessed the tools and knowledge of installing the new process and plant, which the defendants desired for their distillery at Corbyville.

Peter Bouchert, agent for this company, who draws their plans, came to Belleville in the autumn of 1905, and, on behalf of this company, entered into a contract to install the new plant. The Ansonia Company were to furnish all the materials and perform all the work. The Dominion Construction Company had the contract for erecting all buildings required. Like the contract with the Dominion company, the one with the Ansonia people was a very large contract. The headquarters of the Ansonia Company are at Cincinnati, Ohio. There were no provisions as to where this company were to secure workmen. In fact the matter was not mentioned. The Ansonia Company at different times sent on

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men who were in their general employ to do the coppersmith work. At the request and for the accommodation of the Ansonia Company the defendants, after these men had arrived and commenced work, paid their travelling expenses and also their board while working on the job, but such sums of money so paid out by the defendants were charged against the Ansonia Company upon their contract. The police magistrate holds that the Ansonia Company were the agents for the defendants to employ these men to do their work. There is nothing in the evidence, that I can see, to justify such a finding. The men were employed by the Ansonia Company and paid by them.

There is no legal restriction against entering into a contract with a foreign company, and it is no concern of the parties here as to where such foreign contractor obtains his workmen. If the foreign contractor violates the statute under consideration, the remedy is to bring such men before a magistrate, and, if a breach of the law is proved, to deport them. But the evidence of Bouchert shews that there are only three distilleries in the world, and none of them in Canada, that have a plant similar to this, and that without his plans the work could not have been done and that he would not intrust them to any one but his own foreman. In fact, as Frotescher, the foreman, states in his evidence, "We have some new improvements, which we don't like other people to handle." It seems to me clear, therefore, that skilled labour could not have been obtained anywhere in Canada to do the work done by these men. The defendants are expending a very large sum of money in endeavouring to extend and build up an industry far beyond the old one so well carried on by Mr. Harry Corby, furnishing employment for a larger amount of men, a larger market for our cattle and grain and other produce of our country, in fact adding to the wealth of our country. Canada is extending rapidly in every direction and in all manner of industries. Common labour is scarcely to be had. Railways and other large interests projected during last year had to be abandoned for lack of men, and if common labour is so scarce, how much more so is the skilled citizen?

This statute is copied from the United States Act, and is meant as a set-off to the same. It was aimed against wholesale importation of lumbermen into our woods, and workmen in times of strikes and other occasions. I do not

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think that it is the spirit or intent
cripple a large industry. Being a pe
it ought to have a liberal construction
public good.

In the cases of Harry Hortell, Alex
man Frotescher, August Kuhert, Ja
Wonderlich, Edward Bretzel, and Alfre
must be allowed and the several conv
each party to pay their own costs.

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THE

ONTARIO WEEKLY REPORTER

(To and Including April 27th, 1907).

Vol. IX. TORONTO, MAY 2, 1907. No. 16

FALCONBRIDGE, C.J. APRIL 20TH, 1907.

WEEKLY COURT.

RE FEAVER.

Will—Construction—Specific Legacy—Lapsed Legacy—Absorption in Residue—Distribution per Capita—Sale of Lands—Payment of Incumbrances and other Debts.

Motion by William Hazell, executor of the will of Susan Feaver, deceased, for the opinion, advice, and direction of the Court under Rule 938 in reference to the will and as to the administration of the assets of the estate.

The will was as follows:—

"I direct, first, that all my just debts, funeral and testamentary expenses, be first paid and satisfied out of my estate by my executor hereinafter named as soon as may be conveniently done after my decease.

"I then secondly give, devise, and bequeath unto my niece Susanna Emily Willgoss Beckett, of the city of Hamilton, spinster, my house and premises known as 236 Emerald street, North Hamilton, free of all incumbrance as hereinafter provided for, to be her own absolutely in fee simple.

"I then thirdly give and devise to my executor my properties known as Nos. 120, 122, 124 Elgin street, North Hamilton, to be held by him in trust and sold as soon as conveniently can be after my decease, and, after satisfying all incumbrances, the balance of the proceeds to be divided by him equally share and share alike among my three sisters, Mrs. Jane Foster, Australia, Mrs. Eliza Sturgeon, Kent,

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England, and Mrs. Constance Beckett,
England.

"I then fourthly give, devise, and
nephew Thomas Feaver, to be his own
erty on Melbourne street known as No.
and to my nephew Arthur Feaver to b
my property on Melbourne street kno
street, both of said nephews being the
sons of my brother Thomas Feaver, of
in the county of Wentworth, and b
in the city of Hamilton, Ontario.

"I then fifthly give, devise, and be
executor my properties known as 75 an
in the city of Hamilton, Ontario, W
trust to sell, and out of the proceeds:
isting incumbrance on No. 236 Emerald
devised to my niece Miss Beckett; an
my debts that may not have been pai
my personalty or any other property n
and after that the remaining balance sh
share and share alike among my three
may be living, i.e., children of Mrs
Eliza Sturgeon, and Mrs. Constance
named.

"All the rest and residue not h
order to be divided share and share
beneficiaries of my will.

"And I nominate and appoint and
executor of this my last will and test
William Hazell senior, of the city of

The questions propounded for the
were as follows:—

1. Is the bequest made in clause
specific legacy to the parties therein

2. (A) Mrs. Jane Foster, Australia
the testator and died before date of
what becomes of the portion of the
bequeathed to her?

(B) Does it go into the residue u
so, who share in it under the terms of

(C) If otherwise, who share in it
tions?

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3. (A) What is the proper application of the proceeds realized from the sale of 75 and 81 Chatham street under clause 6 of the said will?

(B) Is the property under clause 4 specifically devised so as not to come within the meaning of the phrase "any other property not specifically devised" in said clause?

(C) Does the clause in question mean that the proceeds realized from the sale of 75 and 81 Chatham street are applied: (1) in payment of incumbrance on 236 Emerald street north devised; (2) in payment of balance of debts not paid and satisfied by the personalty; and (3) balance if any to be divided?

(D) Or must the proceeds realized from properties 120, 122, and 124 Elgin street north, referred to in clause 4, go to satisfy debts as "other property not specifically devised?"

(E) Or is the total realized from the personalty and from sale of 75 and 81 Chatham street a fund for payment of the incumbrance on Emerald street north and all the other debts of the testator?

(F) If there is a balance under clause 6, do the children of Jane Foster (who was dead at the execution of the will) share in it with the children of Mrs. Eliza Sturgeon and Mrs. Constance Beckett?

4. Do Susannah Emily Willgoss Beckett, Thomas Feaver, and Arthur Feaver, who get specific devises of real estate under other clauses of the will, share in any residue of the estate and in any lapsed legacies that may go into the residue of the estate?

5. What is the proper mode of distribution of the $1,003.56 in the hands of the executor, having regard to the answers to the aforesaid?

W. M. McClemont, Hamilton, for the executor and 9 of the beneficiaries.

L. F. Stephens, Hamilton, for Constance Beckett and 5 others, beneficiaries.

J. H. Publow, Hamilton, for Eliza Sturgeon and two others, beneficiaries.

FALCONBRIDGE, C.J.:—In answer to the first question contained in the notice of motion, the bequest in clause 4 of the will is specific.

To the second question (A), the bequest to Mrs. Jane Foster lapses, she having predeceased the testatrix; and, as

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it was evidently the intention of the testatrix to dispose of her whole estate, the lapsed portion falls into the residue.

In answer to question 2 (B), the lapsed portion falls into the residue under clause 7, and goes to the beneficiaries therein designated per capita.

To question 3 (A), the proceeds realized from the sale of 75 and 85 Chatham street, under clause 6 of the will, are applicable towards the payment of the mortgage on the Emerald street property devised to Miss Beckett, niece of testatrix.

To 3 (C), the answer is "yes," as regards payment of incumbrance on Emerald street property, and the balance (if any) in payment of the other debts after exhausting the personalty and the lapsed share.

To 3 (B), yes, as to the one-third lapsed share.

To 3 (E), no.

To 3 (F), yes.

To 4, yes. They share equally with the other beneficiaries per capita.

It is not necessary to answer the other questions, as the executors should, in view of the above answers, be able to distribute the sum mentioned.

Costs to all parties out of the estate.

CLUTE, J. APRIL 22ND, 1907.

CHAMBERS.

CAMPBELL v. CROIL.

Money in Court — Ownership of — Partnership — Judgment Creditors — Stop Orders — Creditors' Relief Act — Payment out to Sheriff for Distribution.

Appeal by execution creditors of firm of Croil & McCullough from order of Master in Chambers, 8 O. W. R. 67, directing payment out of the money in Court to the sheriff of Stormont, Dundas, and Glengarry, to be treated as money levied under execution against defendant McCullough and dealt with under the Creditors' Relief Act.

Grayson Smith, for the appellants.

W. E. Middleton, for an opposing creditor.

CLUTE, J., dismissed the appeal with costs.

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APRIL 22ND, 1907.

DIVISIONAL COURT.

FINDLAY v. HAMILTON ELECTRIC LIGHT AND CATARACT POWER CO.

Negligence—Injury to Person by Electric Wire—Proximity to Highway—Findings of Jury—New Trial.

Appeal by plaintiff from judgment of RIDDELL, J., ante 434.

G. Lynch-Staunton, K.C., for plaintiff.

W. W. Osborne, Hamilton, for defendants.

THE COURT (MULOCK, C.J., MAGEE, J., CLUTE, J.), set aside the findings of the jury, and the judgment for defendants, and directed a new trial; costs of the former trial and of the appeal to be costs in the cause.

APRIL 22ND, 1907.

DIVISIONAL COURT.

FAULKNER v. GREER.

Timber—Issue as to Ownership—Severance by Stranger—Waiver of Tort—Conveyance of Land by Husband to Wife—Title to Timber—Amendment of Issue—Parties—Damages—Money in Court—Payment out—Interest—Costs.

Appeal by defendants from judgment of MAGEE, J., ante 241, in favour of plaintiff upon the trial of an interpleader issue.

W. H. Blake, K.C., for defendants.

C. A. Moss, for plaintiff.

The judgment of the Court (FALCONBRIDGE, C.J., BRITTON, J., CLUTE, J.), was delivered by

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CLUTE, J.:—. . . Plaintiff affirms and defendants deny that on 29th September, 1905, plaintiff was entitled to $3,781.11, moneys paid into Court by the Barnett-McQueen Co., Limited, being proceeds of 1,274 spruce and tamarack piles claimed by plaintiff, as having been cut on his land, as against defendants, who delivered the piles to the company before the said date. . . .

The trial Judge . . . found the issue in favour of plaintiff, and directed that the balance in Court, $3,745.71, with interest, be paid out to her.

There is very little dispute about the facts. Before 2nd June, 1905, plaintiff's husband, George Faulkner, owned the lots on which the timber was cut, and on that day conveyed the same to his wife for valuable consideration. The timber was cut and removed from the lot in question prior to the deed by the husband to the wife, but neither the husband nor the wife knew that this trespass had been committed. The timber was cut and removed without any colour of right. There is no doubt from the evidence that the husband intended to convey the land with the timber upon it to plaintiff, and both parties to the deed supposed that he had done so until they subsequently found that the timber had been removed from the property.

The trial Judge found—and I see no reason to disturb his finding—that defendants had no knowledge as to the ownership of the timber. Defendants purchased the timber from Dunn & Evoy, who had committed the trespass, for $2,451.66. They asserted that they expended $430 in removing the same to Port Arthur, although Horne, their witness, puts this expense at $150. They also expended for labour in cutting off the butt ends of the piles $137. The trial Judge also finds that the company accepted from defendants 214 piles which came from the lots in question, amounting, at the current price, to $3,750.11. He further finds "that all these were cut and removed to the ice just outside the limits of lot 1 before the date of that deed to plaintiff, but that neither plaintiff nor her husband had any knowledge thereof at the execution of that deed. As that deed appears to have been for valuable consideration, I must assume that both parties supposed the timber to be there. The consideration included it, and the wife would be entitled to it as vendee, even if the deed does not have the effect of conveying it to her as part of the realty severed by a stranger without the knowledge or consent of the

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owner, and therefore not deprived of its character of realty as between grantor and grantee."

I think there can be no doubt, as between the husband and wife, that the wife was entitled to the timber in question, and it does not lie in the mouth of the trespasser to challenge this right between husband and wife. Plaintiff is therefore entitled to recover the value of the timber to the same extent as against the wrongdoer as she would have been if the timber had not been cut until after the date of her deed.

The substance of the issue, not the form merely, is to be looked at, and, inasmuch as plaintiff claimed the timber by deed through her husband, and he was willing to be joined as a party, I should have thought that the amendment applied for might have been granted. The form of the issue would not have been changed in substance, because the wife would be simply using her husband's name with her own to recover the property which belonged to her, and, therefore, I think that Canadian Pacific R. W. Co. v. Rat Portage Lumber Co., 10 O. L. R. 273, 5 O. W. R. 473, does not apply to preclude such an amendment. But I agree with the trial Judge that the amendment was unnecessary.

The question then remains, what portion of the moneys paid into Court is plaintiff entitled to recover? . . .

[Reference to Smith v. Baechler, 18 O. R. 293; Hilton v. Woods, L. R. 4 Eq. 432; In re United Merthyr Collieries Co., L. R. 15 Eq. 46; Livingstone v. Rawyards Coal Co., 5 App. Cas. 25; Jegon v. Vivian, L. R. 6 Ch. 742.]

Plaintiff's claim in the original action is for $3,500 damages for cutting and taking timber off the lot in question, and for a declaration as against defendants that plaintiff is entitled to the proceeds of the timber. The action was brought against the defendants in the issue and against the Barnett-McQueen Co. The company obtained leave to pay the amount into Court, less their costs of the application, and an issue was directed as to the ownership of the money in Court. The case is not identical with any case that I have been able to find. The money having been paid into Court, the plaintiff, claiming the same, has elected to take the proceeds of the sale. At the time the timber was cut and removed she was not the owner of the land. She becomes entitled to claim the proceeds by having purchased the land on the supposition that the timber was still upon it. I do not see, therefore, how an action for trespass to

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the land can be maintained by her, because at the time of the trespass she was not the owner. She is only entitled to the proceeds of the sale of the timber by reason of the subsequent sale to her made upon the assumption that the timber was still upon the land. She elects, by bringing the action in her own name, to treat the severed portion as a chattel. Indeed, I think no other form of action could be maintained by her, having regard to the date of the deed. This being so, it would seem that she is entitled to recover only its value when first severed. . . .

[Reference to Clerk & Lindsell's Law of Torts, 4th ed., pp. 275, 359; Martin v. Porter, 5 M. & W. 351; Wood v. Morewood, 3 Q. B. 440; Jegon v. Vivian, L. R. 6 Ch. 742; Taylor v. Mostyn, 33 Ch. D. 226; Livingstone v. Rawyards Coal Co., 5 App. Cas. 25; Peruvian Guano Co. v. Dreyfus, [1892] A. C. 166; Reid v. Fairbanks, 13 C. B. 692; Union Bank v. Rideau Lumber Co., 4 O. L. R. 721, 1 O. W. R. 764; Bulli Coal Co. v. Osborne, [1899] A. C. 351.]

In the present case the defendants were not the original wrongdoers. They bought without knowledge of the trespass; they have added to the value of the timber by its transport to Port Arthur. Plaintiff does not claim the timber in specie. Plaintiff has in a sense affirmed the sale to the defendants, and the subsequent sale to the Barnett-McQueen Co. The judgment appealed from gives to plaintiff the proceeds of the last mentioned sale. I do not think this is equitable. I think the equitable rule laid down in the above cases should be applied. We are not dealing with the original trespasser. What then ought to be the measure of damages to be allowed plaintiff? Plaintiff is entitled to recover the value of the timber taken, that is, the value of the timber to plaintiff as it stood. She is not entitled "to fasten upon any increment of value which from exceptional circumstances may be found to attach" to the timber.

This value of the timber should not be scrutinized too closely or weighed in golden scales. This value may be placed at $600 at the date of the deed, and plaintiff is entitled to interest from 2nd June, 1905, upon that amount, together with the costs of the action and of the issue, of the interpleader application and trial, and of this appeal; and, on these several sums being paid to her out of the moneys now in Court, the balance may be paid out to defendants.

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APRIL 22ND, 1907.

C.A.

DELAMATTER v. BROWN.

Contract — Breach—Damages—Construction of Contract—Removal of Brush from Land — Removal of Trees — Quantum of Damages.

Appeal by defendants the Brown Brothers Co., Nurserymen, Limited, from such part of an order of FALCONBRIDGE, C.J., on appeal from the report of the Master at Welland, as did not allow the appellants' appeal from the report, the action being to recover damages for breach of an agreement with respect to land leased by plaintiffs to the co-defendants. The Master assessed the damages at $6,335, and the Chief Justice on appeal made some deductions from that amount.

E. D. Armour, K.C., for appellants.

W. M. German, K.C., for plaintiffs.

The judgment of the Court (MOSS, C.J.O., OSLER, GARROW, MACLAREN, MEREDITH, JJ.A.), was delivered by

OSLER, J.A.:—. . . The objection renewed on the present appeal that some of the causes of action or heads of damage dealt with by the Master had not actually accrued or arisen at the date of the issue of the writ, though existing at the date of the trial, is not open to defendants. These matters were referred by the judgments or one of them, and, the judgments standing not appealed from and unreversed, we cannot see that the Master was in error in treating the claims as proper to be considered by him on the reference.

We are, however, of opinion that in two respects the learned Judge should have gone further than he did in allowing the appeal from the report:—

(1) The Master allowed a sum of $625, part of the item No. 3 of the heads of damage referred to in objections 2 and 5 in the grounds of the appeal before Falconbridge, C.J., viz., for not removing all growth of brush along the fence on the east side of the bush land. This, which on the evidence seems to be an extravagant charge in any case, includes the cost of removing the brush on both sides of the

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fence, on the defendants' side as well as the plaintiffs'. Upon the fair construction of the agreement between the parties, it appears to us plain that the defendants only obliged themselves to remove the brush on one side of the fence, that is to say, within the land which had been demised to them by the plaintiffs, and which was separated by that fence from other land belonging to plaintiffs. There was no reason why defendants should have stipulated to remove brush on the plaintiffs' side of the fence, which had not been allowed to grow there by them, and which during their term they would have had no right to remove or interfere with, and the agreement of 6th April, 1904, does not, in our opinion, cast upon them the obligation of doing so. This item of damage should, therefore, be reduced by at the very least the sum of $325, leaving, it may be said, an extremely liberal allowance of $300 for the work necessary to be done on that side of the fence which the defendants should have cleared.

(2) An item of $100 for the cost of removing willow trees on the north-east corner of the land which had been leased to the defendants. We do not see how these can come within the description of nursery trees which the defendants agreed to remove. They were neither planted nor used as such, but appear to have been a natural growth from suckers from slips planted many years ago. This item should also be disallowed.

The judgment below will, therefore, be varied to the extent indicated.

Success being divided, there will be no costs of the appeal.

APRIL 22ND, 1907.

C.A.

McKENZIE v. GRAND TRUNK R. W. CO.

DICKIE v. GRAND TRUNK R. W. CO.

Railway—Farm Crossing—Overhead Bridge and Underpass—Depriving Owner of—Contract—Damages—Board of Railway Commissioners.

Appeals by defendants from judgment of MEREDITH, C.J., 7 O. W. R. 798, in favour of plaintiff in the first ac-

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tion, and from the judgment of BOYD, C., in favour of plaintiff in the second action. The actions were for damages for injuries to the farms of plaintiffs by substituting for the bridges or farm crossings to which they were entitled upon the severance of their farms by defendants' railway, a different means of crossing.

The appeals were heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, MEREDITH, JJ.A.

W. Nesbitt, K.C., for defendants.

T. G. Meredith, K.C., and D. A. McDonald, London, for plaintiffs.

MOSS, C.J.O.:—These two cases, though tried at different times and by different Judges, were argued together in this Court, the points involved being substantially the same in each case.

In the first named case the (consolidated) actions are for the purpose of preventing the defendants from changing or interfering with a bridge and way over and across the defendants' line of railway, which intersects the plaintiff's farm from east to west, and also to prevent them from changing or interfering with an underpass on another part of the plaintiff's farm provided as a means of access under or across the defendants' line of railway which intersects it from east to west.

In the other case the action is to prevent the defendants from changing or interfering with a bridge and way over and across the defendants' line of railway, which intersects the plaintiff's farm from east to west. In each case the defendants, notwithstanding injunctions obtained by the plaintiffs, proceeded to alter the form and construction of the bridge and underpass, and damages are claimed for the injuries thus occasioned.

The defendants' answer to the plaintiffs' complaints are the same in each case. They say that they were never under any obligation to construct any of the crossings in question, and, if the plaintiffs are entitled to require the defendants to retain the crossings or maintain others, they are obliged to obtain orders from the Board of Railway Commissioners under the provisions of the Railway Act, 1903.

It was shewn that the bridges and underpass were constructed in the year 1854, at the time when the line of railway was being laid down or constructed over the plaintiffs'

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respective farms. At that time there was in existence legislation imposing on some, though perhaps not all, railway companies, the duty of erecting and maintaining farm crossings of the railway for the use of proprietors of lands adjoining it. At all events the legislature had recognized the propriety of affording protection in this respect to land owners whose lands were crossed by railways. Whether the bridges and underpass were constructed in the belief that the duty was upon the railway company, or because of an agreement between the company and the then proprietors of the lands through whom the plaintiffs claim, it is the fact that the company did construct them, and that for more than 50 years they have been maintained and used in connection with the plaintiffs' farms, with the knowledge of the defendants and of their predecessors in title, and without any objection on their part.

If there were agreements, the defendants are as fully bound by them to-day as were their predecessors at the time they were made. There could be no question of ultra vires. The subject matter was one which was clearly within the powers and authority of the railway company in dealing for the acquisition of a right of way for their line of railway. And there is nothing in any of the cases cited or referred to that supports the proposition that in regard to a matter of this kind it is incompetent for, or beyond the authority of, a railway company to contract with a landowner. There is sufficient in the circumstances and the proved facts to fully justify the conclusions of the trial Judges that the bridges and underpass were provided for and enjoyed by the plaintiffs' predecessors in title as part of the agreement or arrangement under which the defendants' predecessors in title acquired their right of way through the lands in question. That this is so in the case of Dickie is made apparent by the production of the agreement dated the 21st December, 1874, between George Dickie and the Great Western Railway Company, which recites the fact that the company in the construction of their railway across the plaintiff's farm lot severed it into two portions, and for the purpose of enabling the owners or occupiers to pass and repass from the one portion to the other a bridge was provided for farming purposes, and released the company from all obligation to maintain or provide a bridge except the one now in question. This instrument was not executed by the defendants' predecessors in title, but at the time of the

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trial it was more than 20 years old, and was therefore evidence of the truth of the facts as therein stated: R. S. O. 1897 ch. 134, secs. 2 and 3. See also Regina v. Guthrie, 41 U. C. R. 148. And it may fairly be inferred from the evidence in the case of McKenzie that a similar agreement or arrangement was come to with his predecessors in title.

Upon this conclusion the defendants were in the wrong in assuming to interfere with the plaintiffs' rights, without the sanction and authority of the Board of Railway Commissioners. The circumstances of these cases do not warrant the contention that it lay upon the plaintiffs to apply to the Board. The defendants were seeking to disturb the status quo, and it was for them to make application in such a case.

And the plaintiffs were entitled to be protected in their rights as they existed until the defendants obtained the authority of the Board for their action.

The appeals should be dismissed.

OSLER and MEREDITH, JJ.A., each gave reasons in writing for the same conclusion.

GARROW and MACLAREN, JJ.A., concurred.

APRIL 22ND, 1907.

C.A.

CRAWFORD v. TILDEN.

Railway—Dominion Undertaking—Mechanics' Liens—Provincial Act—Application of—Constitutional Law.

Appeal by plaintiff from order of a Divisional Court, 8 O. W. R. 548, 13 O. L. R. 169, reversing judgment of CLUTE, J., in favour of plaintiff, in an action to enforce a mechanic's lien against the defendants the Guelph and Goderich Railway Company. Plaintiff was one of a number of men employed upon construction of the railway by defendants Tilden & Co., sub-contractors. The Guelph and Goderich Railway Company were incorporated by a Dominion statute, 4

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Edw. VII. ch. 81, which declared the railway, though wholly within the province of Ontario, to be a work for the general advantage of Canada. The Divisional Court held that the railway being a federal railway exclusively under the legislative control of the Dominion, it was not competent for the legislature of Ontario to enact any law which would derogate from the status and rights and property enjoyed and held by the federal corporation under its constitution created by the Dominion of Canada.

The appeal was heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, MEREDITH, JJ.A.

E. L. Dickinson, Goderich, for plaintiff, contended that the Mechanics' Lien Act having been amended since King v. Alford, 9 O. R. 643, so as to extend to railways, there is no exception as to federal railways, at all events if wholly within the province.

E. D. Armour, K.C., for defendant railway company.

A. M. Stewart, for defendants M. A. Piggott & Co., the principal contractors.

MEREDITH, J.A.:—Where power to build and maintain a railway is conferred, the rights of the public in the concern, as a highway, are of paramount importance; and private interests and rights are necessarily invaded and obliged to suffer to some extent for the welfare of the many. It was, therefore, a very short and necessary step for the Court to take in denying to creditors of the owners of the road any of the ordinary rights which would defeat the paramount purpose in conferring the right to build and maintain the road—would destroy it or materially curtail its public usefulness.

Such considerations are just as applicable to-day as they were in the days when the cases decrying such rights, which have been referred to, were decided. But legislation has since been passed in aid of the creditor. That in question boldly giving the right to sell irrespective of consequences; and the other legislation which indirectly aids by providing that the rights of the company may be exercised by the purchaser, and so removing the cause for the decisions against private rights.

The appellants are seeking to enforce a claim for money against the railway company, by a sale of a portion—probably one-half—of the railway.

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The railway is one which comes under the exclusive power of Parliament, being expressly excepted from the local works and undertakings over which exclusive power is given to provincial legislatures.

Dealing with the case in the more orderly and convenient manner, the first question for consideration is whether federal legislation directly or indirectly permits such a sale as that which the appellants seek.

Section 299 of the Railway Act—R. S. C. 1906 ch. 37—provides a means by which any railway, or any section of a railway, sold under any lawful proceeding, may be run or operated by the purchaser or eventually otherwise dealt with as might be determined by the Governor in council; and this or the like provision has been considered a sufficient removal of the cause for denying a right of sale in aid of private interests: see Central Ontario R. W. Co. v. Trusts and Guarantee Co., [1905] A. C. 576. It plainly recognizes a right to sell in such a case. I assume this provision to be applicable to this case; and if applicable can perceive no good reason why a civil right, conferred upon a creditor by provincial legislation, to sell a debtor's property, for the purpose of payment of the debt, would not be a lawful proceeding within the meaning of this legislation. But I am unable to perceive how so much of the lands of this railway as happen to be within the territorial limits of the county of Huron, can be considered a railway, or a section of a railway. The context shews very plainly that the section of a railway, in respect of which this parliamentary provision was made, must be one which is capable of being "run or operated." To permit a sale of a part which is incapable of practical use without the rest, and which sale would destroy the usefulness of the rest, would be a very flagrant violation of the principles before referred to.

Federal legislation, therefore, does not aid the appellants.

But reliance was placed, and mainly, if not entirely, placed, upon provincial legislation; which in plain terms has given the appellants a right of sale such as they seek, even against a railway under the exclusive power of Parliament, but with this saving clause, "in so far as the legislature of this province has authority or jurisdiction in regard thereto."

The creation of a right such as the appellants allege, and the enforcement of it in the manner sought, are matters

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which come within the meaning of "property and civil rights in the province," subjects which are within the exclusive legislative power of provincial legislation; but an enactment, under such general power, which encroaches upon the exercised power of Parliament, in respect of any particular subject coming under its exclusive jurisdiction, cannot prevail; and the enactment in question distinctly does that; the principle before referred to, and the cases decided upon it, shew that any exercise of private rights which would extinguish or substantially impair, the public rights and interests in the railway, as a highway, is in direct conflict with the federal legislation providing for the building and maintenance of the road. The legislation which gave the power to sell this railway piecemeal, was, therefore, ultra vires, or, to speak more accurately, such legislation is rendered inapplicable to the railway in question by the restricting clause which I have before quoted.

It was said that the lien might be applied to the whole of the road, in order that relief might be given to the appellants; but that was not the appellants' claim in, nor the judgment at the trial of, the action, Nor can I think the enactment relied upon would warrant it. Under the 17th section the lien is to be registered "in the registry office of the registry division.....in which the land is situated." It is hardly likely that the legislature intended to give a workman employed upon a railway in the county of Huron, a lien upon it in the county of Carleton, for instance, with all the difficulties such a right would create, and the manifest injustice it might do to others having better rights in that far distant county.

For these reasons, I think the appeal should be dismissed: and I think it proper to add, that, if they did prevail, the case would need careful consideration, in regard to the necessary and proper parties to it, the nature and extent of the appellants' rights, the rights and interests of other persons, who may be very much concerned in the nature and effect of the judgment, and the character and extent of the relief which ought to be given. The case seems to have been dealt with somewhat hastily at the trial, on the supposition that the persons more directly concerned in the appellants' claim would pay or settle it, and that a sale would be unnecessary, and very improbable. But in any case it is to be observed that the substance of the enactment is the sale; it would be little use to give a lien—any other

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word would be as effectual—if there were no means of enforcing it.

OSLER, J.A., gave reasons in writing for the same conclusion.

MOSS, C.J.O., GARROW and MACLAREN, JJ.A., concurred.

APRIL 22ND, 1907.

C.A.

CANADIAN PACIFIC R. W. CO. v. CITY OF TORONTO.

Railway — Protection of Public at Highway Crossings — Gates and Watchmen—Liability of Municipality—Orders of Railway Committee of Privy Council and Board of Railway Commissioners—Acquiescence.

Appeal by defendants from judgment of MABEE, J., 8 O. W. R. 348, in favour of plaintiffs in an action to recover from defendants $4,677.11, being the proportion that it was alleged defendants were liable to pay towards the maintenance of gates, etc., at certain streets in the city of Toronto (Dufferin and Bathurst streets and Avenue road) crossed by plaintiffs' line of railway. MABEE, J., held that defendants were concluded by authority upon all the points raised by them as reasons why they should not continue paying under these orders: Perrault v. Grand Trunk R. W. Co., 36 S. C. R. 671; Re Canadian Pacific R. W. Co. and County of York, 27 O. R. 559, 25 A. R. 65; Grand Trunk R. W. Co. v. City of Toronto, 4 O. W. R. 450, 6 O. W. R. 27, 37 S. C. R. 232; Canadian Pacific R. W. Co. v. Grand Trunk R. W. Co., 7 O. W. R. 814.

The appeal was heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, MEREDITH, JJ.A.

J. S. Fullerton, K.C., for defendants.

Angus MacMurchy, for plaintiffs.

MOSS, C.J.O.:—The orders of the Railway Committee of the Privy Council, as constituted under the provisions of the Railway Act of 1888 and amending Acts, upon which the plaintiffs are maintaining this action, were for several years

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treated and acted upon by the defendants as valid and binding upon them. These orders were pronounced upon applications made by the defendants to the Railway Committee for protection at the crossings at rail level of the 3 highways in question, viz., Dufferin and Bathurst streets and Avenue road. The plaintiffs provided the protection ordered, and the defendants paid their share of the expense down to the end of 1901.

The orders were in force at the time of the passage of the Railway Act, 1903, and by virtue of sec. 33 they continue in force until repealed, rescinded, changed, or varied under the provisions of that Act. In 1906, upon an application made by the township of York, to which the defendants were parties, the Board of Railway Commissioners constituted under the Railway Act, 1903, dealt with and treated the orders as valid and subsisting, and refused to rescind or vary them.

The plaintiffs are therefore entitled to have them enforced according to their terms, unless the other defences set up are an answer to the claim. But they appear to be disposed of by decisions binding upon us, and it would be but needless repetition to again traverse the grounds which are fully covered by them. They determine adversely to the defendants' contentions and must be accepted as governing the case in this Court.

The appeal must be dismissed with costs.

OSLER and MEREDITH, JJ.A., each gave reasons in writing for the same conclusion.

GARROW and MACLAREN, JJ.A., concurred.

APRIL 22ND, 1907.

C.A.

METALLIC ROOFING CO. OF CANADA v. JOSE.

Trade Union — Conspiracy — Injuring Plaintiffs' Trade — Evidence—Liability of Central Body—Damages—Injunction—Parties.

Appeal by defendants from order of a Divisional Court, 7 O. W. R. 709, 12 O. L. R. 200, dismissing with costs an

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appeal by defendants from judgment of MACMAHON, J., after trial with a special jury, in favour of plaintiffs for the recovery of $7,500 damages and for an injunction in respect of a conspiracy by defendants, as members of a trade union, to withdraw workmen from the service of plaintiffs, and to injure them in their business. The Divisional Court held that the withdrawal of the men in the midst of their work by the combined action of defendants was oppressive and unfair to plaintiffs, and that there was in effect a boycotting of plaintiffs' goods; and that the loss which resulted to plaintiffs was not overestimated at $7,500.

The appeal was heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, MEREDITH, JJ.A.

J. G. O'Donoghue and T. J. W. O'Connor, for defendants.

W. M. Tilley, for plaintiffs.

GARROW, J.A.:— . . . The plaintiffs carry on business at Toronto as manufacturers of sheet metal building material. The action was brought to recover damages said to have resulted from a strike of the plaintiffs' union workmen, ordered by the defendants the Local Union No. 30 Amalgamated Sheet Metal Workers, and indorsed by the defendants the Amalgamated Sheet Metal Workers International Association or Alliance. For the order as to representation by the individual defendants, see 5 O. W. R. 95, 9 O. L. R. 171.

I agree with the judgment of the Chancellor, 7 O. W. R. 709, 12 O. L. R. 200, to which I have little to add.

Mr. O'Donoghue, counsel for the defendants, in his argument before us endeavoured to make four main points:—

1. Respecting the constitution of the suit and the results to follow from enforcing the judgment.

2. That the plaintiffs' workmen were not coerced nor induced to strike by the defendants; that what they did was their own voluntary act, and within their legal right; that the plaintiffs were not entitled to damages upon that head, and, as there was no separate assessment, there should be a new trial.

3. The international body did not authorize and should not be held responsible for the boycott of the plaintiffs' wares.

4. The damages are excessive.

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We have, I think, nothing at prese
The constitution of the action, in so fa
concerned, was long ago settled, finally,
the fact, if it is a fact, that the plaintif
in collecting their judgment, would b
setting it aside. If in the course of the
under process, the goods of A. to
learned counsel seemed to be apprehe
case, A. will have his remedy.

The difficulty with his next point,
is upon the facts. There was, I think
it, to submit to the jury that the strik
tary act of the workmen, but of the U
organization, and that its purpose was
tiffs into signing an agreement to whi
they had a perfect right to do.

As to the third point, namely, the li
organization for the boycott of the plai
is largely a question of fact, and there
evidence proper for the jury which
finding.

It is not disputed that the central
strike, and supplied strike funds to mai
itself having proved ineffectual to com
agreement, the next step was the boyco
tral organization did not expressly aut
spondence was not produced, nor were
Local Union), they were at once advised
by Mr. Chapman's letter to Mr. Bray o
in which he says: "I must not forget to
has placed this firm (plaintiffs) on the
have notified our employers to that effe
handle any of their products while t
To which no letter or other communic
came back, so far as appears. And
partial although it is, shews that the b
common weapon in use by the defenda
of coercion. See Mr. Chapman's letter
also to Mr. Bray. The correspondence
Bray was kept advised by Mr. Chapman
on, including the beginning of the leg
that the defendant Kennedy, residing
officer in the central association, had
financial assistance to the extent of $200

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that association to the local union to aid them in their legal contest with the plaintiffs. The case is thus very different in its facts from Denaby v. Yorkshire Miners' Association, [1906] A. C. 384, to which we were referred.

Upon the question of damages no more need be said than that this was also a question for the jury, and no one reading the evidence fairly, can, I think, say that the amount is excessive.

The appeal fails, and should, in my opinion, be dismissed with costs.

MEREDITH, J.A., gave reasons in writing for the same conclusion.

MOSS, C.J.O., OSLER and MACLAREN, JJ.A., concurred.

APRIL 22ND, 1907.

C. A.

CROWN BANK OF CANADA v. BRASH.

Promissory Notes — Forgery of Makers' Names—Indorsement in Name of Firm—Liability of Non-authorizing Partner — Discount by Bank — Notice or Knowledge of Manager — Circumstances giving Rise to Suspicion — Findings of Jury—Disregard of one—Rule 615—Judgment of Court.

Appeal by defendant Brash from judgment of a Divisional Court, 8 O. W. R. 400, allowing an appeal from the judgment of TEETZEL, J., at the trial, upon the findings of a jury, in favour of defendant Brash, setting aside certain of the findings of the jury, and directing judgment to be entered for plaintiffs under Rule 615. The action was brought against the surviving partner of the firm of Brash & Campbell, and against the administrator of the estate of Campbell, the deceased partner, to recover upon certain promissory notes indorsed by Campbell in the firm name and discounted by plaintiffs. The jury found that the makers' names to the notes were forged by Campbell and discounted by plaintiffs without the knowledge of Brash, and that plain-

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tiffs, through their local manager, acted honestly and in good faith; but they also found that the manager had notice of the fact that Campbell had no authority from his partner Brash.

The appeal was heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, MEREDITH, JJ.A.

G. H. Watson, K.C., for defendant Brash.

F. Arnoldi, K.C., and W. T. McMullen, Woodstock, for plaintiffs.

GARROW, J.A.:—In my opinion the only question involved in this appeal is whether the Divisional Court was right in disregarding the 8th answer, and that could only be done if there was no proper evidence to support the answer, or if the answer was not material to the issue. But, with that answer out of the way, Rule 615 would, I think, apply to uphold the judgment of the Divisional Court.

The defendant Brash and one Campbell were partners carrying on business as implement agents, which business, it is stated in their articles of partnership, included the sale of farming implements, sleighs, cutters, waggons, buggies, and other vehicles.

The promissory notes in question, having the outward appearance, at least, of ordinary customers' notes, were payable to the order of the firm, and were indorsed by Campbell to the plaintiffs, and by them discounted in the ordinary course of business, and the proceeds placed to the credit of the firm, and afterwards withdrawn upon the firm's cheques by Campbell. It is now said that the notes are forgeries, and the jury has so found, although strange to say one of them was paid by the maker a day or so before the trial.

The plaintiff's action, however, is not against the makers, but against the defendant Brash, and the defendant Brown, the administrator of Campbell (who is dead), as indorsers.

In addition to finding that the notes were forged, the jury found that they were indorsed by Campbell to the plaintiffs in the firm name when he was a partner, and the proceeds placed to the credit of the firm in the plaintiffs' books, that the defendant (Brash) had no knowledge that

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the notes had been so discounted by Campbell (immaterial I think), and that the plaintiffs in discounting the said notes and paying over the proceeds acted honestly and in good faith.

In order to understand fully the 8th question which created the difficulty, it is necessary to also read the 7th to which it is closely related. The 7th question is: "Did the defendant (Brash) ever authorize the said Campbell to discount said notes or to open a bank account in the plaintiff bank? A. No." The 8th question is: "If you answer this question in the negative, did the plaintiffs, through their manager or otherwise, have any notice or knowledge of such want of authority? A. Yes."

It was not claimed or pretended by any one that there ever was express authority in fact given to Campbell by the defendant Brash. What was relied on was the implied authority imputed to him as partner under the circumstances. Teetzel, J., told the jury: "The law is as stated by counsel for the plaintiff, and not contested upon that point by counsel for the defendant, that each partner in a trading company, such a company as the firm of Brash & Campbell was, is presumed, so far as the world is concerned, to have authority to do the business of the firm in the firm's name. Each is presumed to be authorized to indorse the company's paper in the company's name—the firm name. That presumption, which has been the law for centuries, is necessary for the proper carrying on of commercial business; it is necessary that each partner should be bound by the acts of his co-partner done in the ordinary course of the business of the firm, and, as it is manifestly an item in the ordinary course of a firm's business to discount paper which is in his possession as the property of the firm, it is to be presumed as matter of law that he has authority to discount such paper, and prima facie a bank is justified in assuming not only that the paper belongs to the firm, but also that the partner who produces it for discount has authority to sign the firm name upon the back of it. . . . I tell you as a matter of law that I think it is necessary for a defendant partner who seeks to be relieved from liability on account of the indorsement of the notes of the firm, in the name of the firm, to shew such acts as would justify a Court in finding that the banker or merchant who might discount the notes was not acting honestly as between himself and the other

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partner in discounting the paper and handing over the money with a knowledge of the facts."

No fault can, I think, be found with these observations. But what I do not understand is, why, with such a clear and definite statement of the authority implied by law, it was considered necessary or even useful to ask these puzzling questions—7 and 8. They clearly could have no point or meaning except as directed to some express authority in fact conferred or not conferred by Brash, and notice of the absence of such express authority. But notice of the absence of an authority not required seems to lead nowhere. The implied authority was ample for the plaintiffs' purposes, as the Judge himself seemed to think.

The real issue between the parties, as is now perfectly obvious from all the circumstances of the case, and as was apparently the view held by the Judge at the trial, is that of the bona fides of the plaintiffs—were they the holders in due course of the notes in question, which, under sec. 29 of the Bills of Exchange Act, includes taking them in good faith, for value, and without notice. There was no dispute about the value, but there was about the good faith and notice, and a number of circumstances were referred to, but these all bear upon and are included and concluded once and for all in the answer to the 9th question, that the plaintiffs acted honestly and in good faith. That completes their title begun in the answers to the 2nd and 3rd questions. They could not have acted honestly and in good faith if they had notice that Campbell had no authority. And, while there was evidence quite proper for the jury upon the 9th question, there was, I think, absolutely none in support of the 7th and 8th. So that, upon both grounds, namely, the absence of evidence and in any event the immateriality of these answers, 7 and 8, I think the Divisional Court arrived at the correct conclusion.

The appeal should be dismissed with costs.

MOSS, C.J.O., OSLER and MACLAREN, JJ.A., concurred.

MEREDITH, J.A., dissented, for reasons stated in writing.

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APRIL 22ND, 1907.

C.A.

CANADIAN PACIFIC R. W. CO. v. GRAND TRUNK R. W. CO.

Railway—Leasehold Interest in Land—Sublease—Covenant —Payment of Rent—Acquisition of Fee—Surrender—Compensation—Indemnity — Interest — Agreements — Construction.

Appeal by defendants and cross-appeal by plaintiffs from judgment of MABEE, J., 8 O. W. R. 299.

W. Cassels, K.C., and W. A. H. Kerr, for defendants.

E. D. Armour, K.C., and Angus MacMurchy, for plaintiffs.

The judgment of the Court (MOSS, C.J.O., OSLER, GARROW, MACLAREN, JJ.A.), was delivered by

MOSS, C.J.O.:—The questions in dispute in this action have their origin in dealings and transactions between the parties commencing as early as 1892; and much of the difficulty found in ascertaining and adjusting the rights of the parties is attributable to the long time which has been suffered to elapse since the matters now in controversy were first mooted. Many of those who took a prominent part in the transactions are now dead, and it is, no doubt, owing to this circumstance, in part at least, that the case is now presented for adjudication upon a mass of documents and correspondence, coupled with some verbal admissions, without any oral testimony.

The Court is thus left, without the assistance of the recollection of those who were mainly concerned in the matter, to form the best conclusion it may upon the materials before it.

This action was commenced on 27th March, 1906, to recover arrears of rent alleged to be payable under the covenants contained in an indenture of lease dated 20th January, 1886, made by plaintiff Thorne, on behalf of and as trustee for the Canadian Pacific Railway Company, to the defendants, of a parcel of land composed of the southerly 80 feet of that

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part of water lots 50 and 51 lying to the north of Esplanade street, in the city of Toronto, for a term of years expiring in February, 1906.

The rent reserved was $875 per annum, payable half-yearly on the 20th days of January and July in each year, but the plaintiffs set forth in the statement of claim that on or about 1st July, 1894, defendants, with their consent, surrendered a portion of the demised lands to the city of Toronto, and the rent was apportioned, and the amount payable to plaintiffs was reduced to $494.92 per annum; and that subsequent to 1st July, 1894, defendants had made no payment in respect of the said rent. And plaintiffs claimed $5,762.77, being $494.92 per annum from 1st July, 1894, to 21st February, 1906, with interest, and a small sum for use and occupation of the premises from the latter date to the date of the issue of the writ.

In defence defendants set up two agreements, both dated 26th July, 1892, the first made between the Canadian Pacific Railway Company, the defendants, and the city of Toronto, and known as "the tripartite agreement," and the second made between the Canadian Pacific Railway Company and defendants, and known as "the Union Station agreement," and alleged in substance that the effect of those agreements, and of what was done under and in pursuance of them, was to put an end to the claim of plaintiffs under the lease, and that plaintiffs were estopped from making any claim thereunder. They also by amendment alleged that by deed of surrender, dated 20th July, 1894, they surrendered and yielded up to plaintiff Thorne the lands in respect of which the rent was claimed, and that the surrender was duly accepted and acted upon by plaintiffs.

By their reply plaintiffs reiterated that, save as to the portion alleged by them to have been surrendered to the city of Toronto, the lease to defendants remained in full force and effect; that under the agreements of 26th July, 1892, defendants were bound to acquire by purchase as owners in fee for the purpose of the Union Station provided for in the agreement, the portions of the demised lands not surrendered to the city for the purposes of a bridge provided for by the said agreements, and that until such acquisition by defendants the lease remained in full force and effect, and that defendants had not acquired the lands nor paid for the purchase thereof.

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They also set up as an alternative claim that in case it should be held that the lease was surrendered, plaintiffs were entitled to be paid the purchase money for the lands other than those surrendered to the city of Toronto, and (by amendment at the trial) to be indemnified in respect of payments of ground rent made by them to the city of Toronto in respect of the part not so surrendered. They also denied that they were in any way estopped by acts or conduct on their part.

The trial took place before Mabee, J., who, after consideration, gave judgment substantially in terms of plaintiffs' alternative claim, declaring plaintiffs entitled to recover from defendants the value of their leasehold interest in the lands as of 26th July, 1892, less profit rents paid subsequent to that date, and directing a reference to ascertain the amount to be paid by defendants, and also directing defendants to pay to plaintiffs $3,649.47, being instalments of rent paid by plaintiffs to the city of Toronto for the lands since 26th July, 1892, with interest thereon to date of judgment.

Both parties appeal; the defendants because, as they contend, they are not able to pay anything to plaintiffs in respect of the lands in question, but, if liable for anything, it is only in respect of a smaller parcel of the land, and also because they are not liable to indemnify plaintiffs in respect of ground rent; and plaintiffs because, as they contend, the trial Judge should have awarded judgment upon the covenants in the lease. In any event they submit that if not entitled to recover the rent, they are entitled to the relief awarded them by the trial Judge.

The questions for determination are: first, whether the lease upon which plaintiffs found their claim for payment of rent was existing and in force so as to entitle plaintiffs to maintain this action upon the covenant; and secondly, whether, in the event of its not being in force, plaintiffs are entitled to the relief awarded them by the judgment now in appeal. . . .

At the date of the agreements, the plaintiff Thorne was, as trustee for the plaintiff company, the lessee of the city of Toronto of water lots 50 and 51, under assignment from the original lessees named Tinning, and defendants were lessees from Thorne of the southerly 80 feet of these lots, forming a rectangular piece lying to the north of Esplanade street.

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The purpose of the two agreements was to put an end to questions and disputes between the two railway companies with reference to their respective positions on the Esplanade, and to provide for the establishment, erection, maintenance, and user of a Union Station and the approaches thereto by rail, as well as convenient access thereto by the public. Part of the plan was the construction of an overhead traffic bridge from the south side of Front street to some points north of the Esplanade. And it was agreed that in order not to interfere with the free use of York street as a thoroughfare to the proposed Union Station, the bridge should be so constructed that the westerly limit should coincide with the easterly limit of York street, as it was at that time. This rendered it necessary that the bridge should be constructed on the west side of water lot 51; and, as the city of Toronto were the owners, subject to the lease to Thorne of the whole, and the sublease by Thorne to defendants of the 80 feet north of Esplanade street, it was necessary to make some provision with regard to their respective interests. The 7th clause of the tripartite agreement, therefore, provided that "the Canadian Pacific and the Grand Trunk hereby each agree to surrender to the city so much of its lands or its interests therein south of Front street and on the east side of York street now held by it . . . as shall be required for this purpose, the city hereby agreeing to make a fair statement of rent for the future in respect of the land or the interest so surrendered. . . . ."

The effect of clauses 7 and 9 was to oblige defendants to surrender more than two-thirds of the land held under the sublease. . . . .

The remainder comprised a parcel, triangular in shape, lying to the south of the York street deviation and east of the bridge, with an area of about 4,201 square feet, and another small parcel, also triangular in shape, being the extreme north-east corner of the rectangular parcel held under the sublease, containing about 709 square feet. This small parcel seems to be of no particular use to defendants.

The other triangular piece does not appear to have been dealt with by the tripartite agreement, but it was dealt with by the Union Station agreement. By clause 2 of that instrument it was declared and shewn on the plan A. attached thereto to be part of the Union Station property to be acquired by defendants under clause 9 of the same agreement. The effect of these clauses is to oblige defendants to

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acquire the triangular piece as part of the land required for completing the Union Station property as designed and shewn on the plans, and to own and hold it subject to the terms of the agreements, the cost of acquiring it, exclusive of any interest defendants had in it, to be met by them and charged to the capital account provided for by the Union Station agreement.

Under the two agreements the rights and obligations of the parties—plaintiffs and defendants—with respect to the parcel under lease to defendants, seems to be clearly enough defined except as to the small piece in the north-east corner. In a general way over two-fifths were to be surrendered to the city for the purposes of the bridge and the York street deviation, and the remainder (less the small piece) was to be acquired by defendants for Union Station purposes. . . . .

In January, 1893, the city of Toronto passed a by-law for diverting York street eastward as provided in the tripartite agreement. On 4th July, 1893, defendants made application to the city for the purchase of the triangular piece lying south of the diversion, stating that defendants in connection with the Union Station construction were desirous of obtaining the fee in this land, which was then in the city, defendants being sub-tenants of plaintiffs, who assented to defendants obtaining the fee. . . . On 11th July, 1893, the property committee of the city council reported upon the application, stating that the assessment commissioner considered $3,530 a fair value for the land, and recommending that it be sold at that price. . . . .

The position taken that the city must purchase and pay for a release from plaintiffs of the whole rectangular piece was clearly not sustainable. Under the two agreements plaintiffs were parties to the arrangements for the surrender to the city of more than two-thirds of the price without any compensation to plaintiffs other than an abatement of rent and an extension for 7 years of their current lease from the city. And it could not but be apparent to all concerned that the situation created by the two agreements was wholly inconsistent with the rectangular piece continuing under demise to defendants. Plaintiffs, therefore, could not fairly look for further compensation from the city in respect of the portions surrendered or to be surrendered for the purposes of the bridge and the York street deviation. Nothing was left with regard to which a claim could be even plausibly put forward except the triangular piece south of the York street

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deviation and east of the bridge and the other small piece in the north-east corner of the rectangular block. . . .

The surrender (exhibit 12) is dated 20th July, 1894, and is between the defendants of the first part and the plaintiff Thorne of the second part, and, after reciting the leases from the city and the sublease to the defendants, sets forth that it has been agreed between the parties that the defendants should surrender all the lands demised to them by Thorne for the purpose that he on behalf of the Canadian Pacific Railway Company should surrender the same to the corporation of the city, to the intent and for the purpose that the portion required for the deviation of York street should become part of York street as diverted by city by-law No. 3113, and to the intent and for the purpose that the portion thereof lying southerly from York street as diverted should be sold and conveyed by the corporation to the defendants in fee simple. It then surrenders and yields up to Thorne, his heirs, executors, administrators, and assigns, the whole of the rectangular piece, and all the term of the lease yet to come and unexpired, and the defendants' estate, interest, and right of renewal, for the purposes set forth in the recital.

The next instrument is an agreement between the city of Toronto and the plaintiffs the Canadian Pacific Railway Company (exhibit 9), by which the parties mutually agree that the deviation of York street has taken place, and the land required therefor has been provided by the companies within the meaning of clause 9 of the said (tripartite) agreement, and that any formal surrenders in respect of the land then under lease and occupied by such deviation, not yet executed, be executed without further delay and take effect as and from 1st July, 1894, the abandonment or abatement of rent provided for in the said clause to be in proportion of the area surrendered to that of the whole land covered by the leases, and the extension of the current leases as provided in clause 7 of the tripartite agreement to be made without delay.

Following this agreement, and evidently with the intention of giving effect to it, the plaintiffs' solicitors, on 30th April, 1895, send to the city solicitor for approval a draft surrender from Thorne to the city of the lands embraced in the deviation of York street and those lying to the south thereof north of the Esplanade, and also a new lease of the

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remainder of the Tinning lots extending to Front street north of the deviation, adding: "We have already obtained a surrender from the Grand Trunk of the lands held by them under the assignment from Mr. Thorne, a copy of which we enclose for perusal."

The instrument drafted and sent by the plaintiffs' solicitors, after reciting the leases, the tripartite agreement, the agreement of 4th February, 1895, and other matters, contained a surrender by Thorne to the city of: (1) the lands required for the purpose of the York street deviation; (2) all the portion of the rectangular piece that had been leased by Thorne to the defendants lying to the south of the deviation; and (3) all the remainder of the lands held by Thorne from the city under the Tinning lease assigned to Thorne. It also set forth that the surrender of parcel (2) was to the intent and for the purpose that the city should and might convey the same to defendants in fee simple, or that the same might be acquired by defendants. And it further provided that the city absolutely acquitted and discharged Thorne from and after 1st July, 1894, of and from all rent to accrue and all covenants, stipulations, and obligations, from and in the Tinning lease with respect to the portion surrendered for the purpose of the deviation of York street, and from the day of the execution of the instrument the portion surrendered for the purpose of the conveyance to the defendants, the amount of rent in each case to be such proportion of the whole rent reserved as the areas respectively bore to the whole area.

Differences arose between the solicitors as to the frame of the surrender, the city solicitor objecting to the insertion of the words referring to the intention to sell the triangular piece to the defendants, and the plaintiffs' solicitors insisting that they should be retained or that the surrender of that piece should be struck out of the instrument. On 9th July, 1895, the city solicitor returned the draft surrender to the plaintiffs' solicitors, saying, inter alia: "You said you desired to prepare a new draft to omit from the surrender the triangular portion intended to be conveyed to the Grand Trunk Railway. Mr. Bell of the Grand Trunk objects to this and says the Grand Trunk has surrendered to Horace Thorne the triangular portion, and in fact all of lots 50 and 51 which it held under lease from him. He says that the triangular piece was a part of the land to be acquired by the Grand

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Trunk Railway for the purpose of the Union Station under the agreements with your company of 1892, it being included within the additional land referred to in clause 9 of that agreement upon which 4¼ per cent. per annum is to be paid by the two companies." This was a fair re-statement of the position, and—having regard especially to the report of the property committee of the city council of July, 1893, recommending the sale to defendants—ought to have removed all difficulty between the city and plaintiffs as to the former accepting the surrender, even though accompanied by the words objected to. But it still lay with plaintiffs to make the surrender in order to enable the defendants to purchase or acquire the triangular piece in accordance with the agreement. The plaintiffs, however, took the ground that their negotiations with the city having failed they were entitled to return to the defendants the surrender executed by them and to demand payment of rent as usual under the sublease, which they did by letter of 2nd August, 1895, addressed to the plaintiffs' manager. The latter returned the surrender to the plaintiffs' solicitors on 3rd August, 1895, saying it was executed by the defendants in good faith, and that if there had been any failure on the plaintiffs' part to carry out a portion of the agreement which they undertook, as he understood, to do between them and the city, it was a matter with which the defendants had nothing to do. The plaintiffs' solicitors again sent the surrenders back to the manager, who once more returned them, and this incident was closed by a letter from plaintiffs' solicitors on 14th August, 1895, saying their clients claimed no interest in them, and they remained with them entirely at the defendants' risk and subject to their order.

Further correspondence and interviews took place between the various solicitors, in the course of which plaintiffs made a claim to be compensated for a value to them in the triangular piece beyond the rental which was being paid to the city therefor, in consequence of which negotiations were again suspended. See city solicitor's letter of 9th September, 1897.

The plaintiffs' claim in this respect was subsequently formulated in a letter to the city solicitor dated 17th January, 1900, in which it is stated also that defendants are not paying any rent and decline to do so, and that plaintiffs can hardly be expected to pay rent to the city for the triangular piece, and that it is not fair that the defendants

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should expect them to lose the difference in the rent. Further correspondence ensues between the various solicitors, and, later on, between the plaintiffs' president and the defendants' second vice-president and general manager, continuing at intervals until shortly before the commencement of the action without any result being arrived at.

The fair conclusion from the documents and correspondence, some of which has been referred to, coupled with what appears to have been done by the parties within a comparatively short time after the execution of the agreements of 26th July, 1892, is that it was not contemplated or intended by the parties that the lease to the defendants should continue in existence, or that they should, as regards either the city or the plaintiffs, be considered or treated as holding any of the lands under the lease, and that the surrender executed by them was intended to extinguish the lease, and it was treated and accepted by the plaintiffs as a performance by the defendants of their obligation under the tripartite agreement, leaving them in a position to acquire the triangular piece by purchase or otherwise, as they were bound to do under the Union Station agreement; and that afterwards they endeavoured to procure the title to the triangular piece, but were unable to do so owing to differences between the plaintiffs and the city with regard to the surrenders which the former were to give to the city. After that the default lay between the city and the plaintiffs, and by the one demanding and the other continuing to pay rent in respect of the rectangular piece, they could not saddle the defendants with a liability they were under no obligation to assume. They were no longer liable to pay any sum in the shape of rent for the triangular piece, and they were justified in disregarding the demands for rent which, in the course of office routine apparently, were rendered to them periodically by the plaintiffs. They were no longer lessees of the plaintiffs, but, as regarded them, were parties bound to acquire the fee simple of the triangular piece, and, as regarded the plaintiffs and the city, they were intending purchasers of the fee simple of the same piece, in which both the plaintiffs and the city were interested, though not precisely in the same estates or areas.

It follows, therefore, that the judgment, in so far as it declares that the plaintiffs are entitled to be indemnified by

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the defendants in respect of rent paid to the city for the lands in question, and directs the defendants to pay the plaintiffs the sum of $3,649.47, cannot stand.

Then with regard to the other relief awarded the plaintiffs, the defendants are still under obligation to acquire by purchase or otherwise the fee simple of the triangular piece, as shewn on map or plan A. attached to the Union Station agreement, and to pay or compensate the parties having interests therein according to the nature and extent of such interests. The plaintiffs are still lessees of all that portion of the piece lying east of the eastern line of the York street bridge, and they should be compensated for the value of their leasehold interest in so much of the lands, and the defendants being in the occupation and enjoyment thereof should render such compensation, and then acquire the fee simple from the city in accordance with the Union Station agreement. And to that extent the judgment should stand, the second paragraph of the formal judgment being modified so as to limit the area of the lands as above indicated.

In connection with this branch of relief it is proper to notice the argument on the plaintiffs' behalf that under the tripartite agreement only so much of the land under the York street bridge as was necessary for the foundations of the piers supporting the bridge was to be surrendered by the plaintiffs to the city.

The language of clause 7 does not lead to that conclusion. The object of placing the bridge on the east side of York street was to avoid interfering with the free use of that street as a thoroughfare to the proposed new Union Station, and so much of the lands as were required for the purpose were to be surrendered. There is no restriction on the generality of these terms. The words "or its interest therein" plainly point to the character of the holding, and were not intended to and do not apply to space or area. And keeping in view the relation of the parties—that the city was the lessor and the two companies holders of leasehold interests—it is reasonable to conclude that what was meant was that there was to be a surrender in fact and in law of so much of the lease as covered the soil over which the bridge extended. The city would necessarily need access to the abutments, supports, and other portions of the bridge, for the purpose of repair and other necessities, and it can scarcely be supposed that these were intended to be left dependent upon uncertain implications. It is to be noted also that by

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the terms of the subsequent agreement between the city and the plaintiffs of 4th February, 1895, the right to use that part of the land under the bridge is expressly given to plaintiffs, and it is there stipulated for the first time that plaintiffs' interests are to be surrendered for the purposes of the bridge, in so far as it can be done without impairing the usefulness or safety of the bridge, subject at all times to the right of entry thereon by the city for the purposes of supervision, maintenance, and repair of such bridge. The plaintiffs have thus obtained greater rights in respect of the soil under the bridge than they were entitled to under the tripartite agreement. But this does not affect the position of, or enlarge the claim against, the defendants.

The appeal should be allowed to the extent indicated, and the cross-appeal should be dismissed. The costs of the action and of the reference directed should be reserved until after the referee shall have made his report.

The costs of the appeal and cross-appeal must be borne by the plaintiffs.

It is unfortunate that, after so many years, the parties have been unable to agree with regard to this comparatively insignificant matter. It seems strange that a thing which appeared to have been quite easy of adjustment at the outset should have been allowed to drift for so many years on oceans of correspondence and negotiations, only to land at last in prolonged and expensive litigation. Even yet an earnest effort may bring about an arrangement more satisfactory than judicial attempts to ascertain and determine the exact rights of the parties after the lapse of so many years.

APRIL 22ND, 1907.

C.A.

LEE v. TOTTEN.

Trusts and Trustees—Breach of Trust—Threat of Litigation — Promise to Make Amends by Will — Compromise — Consideration — Enforcement — Revocation of Will — Claim on Estate.

Appeal by plaintiff from judgment of MACMAHON, J., 8 O. W. R. 823, dismissing without costs an action brought

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by John C. R. Lee, on his own behalf and as executor of Sophia Lee, deceased, against the executors of Julia Stanton, deceased, to compel defendants to make good to plaintiff out of the estate of Julia Stanton, deceased, the share to which plaintiff was entitled as representing Sophia Lee, had Julia Stanton by her will provided for Sophia Lee and her representatives equally with other members of the family of William H. Stanton, deceased, or to restore a settled fund and interest, and for administration of the estate of Julia Stanton.

The appeal was heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, JJ.A.

A. C. McMaster and D. D. Grierson, for plaintiff.

H. M. Mowat, K.C., and J. E. Robertson, for defendants.

MACLAREN, J.A.:—The plaintiff has appealed from the judgment of MacMahon, J., of 15th December, 1906, dismissing without costs his action against the executors of the late Julia Stanton. The action was brought by plaintiff, who is the executor and residuary legatee of his mother Sophia Lee, to receover the sum of $2,000, which it is alleged the late W. H. Stanton held in trust for his sister, Sophia Lee, and which was lost by unfortunate investments, and for which his widow, Julia Stanton, had become responsible.

The trial Judge held that no binding agreement on the part of Mrs. Stanton has been proved, and dismissed plaintiff's action with costs.

From the evidence it appears that what remained of the above sum was at the time of the death of W. H. Stanton in June, 1879, invested in the stock of the Consolidated Bank, which suspended payment in August of that year.

Mrs. Lee thereupon made a claim upon Mrs. Stanton, and negotiations ensued, Mr. F. Arnoldi acting for Mrs. Lee and Mr. H. W. M. Murray representing Mrs. Stanton. The only writing in connection with this which is produced is a letter from Mr. Murray to Mr. Arnoldi, dated 9th October, 1879, saying that Mrs. Stanton repudiated any legal liability, but that, if it were left to her as a matter of honour, she would do what she believed her husband would have done, namely, make up to Mrs. Lee as long as she should live the amount which the dividends of the Consolidated Bank stock

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should fall short of $100. He also added: "I desire also to say that Mrs. Stanton has, as you no doubt are aware, provided for Mrs. Lee in her will equally with other members of the family."

Mr. Murray has no distinct recollection of what passed between him and Mr. Arnoldi, or of the terms of Mrs. Stanton's will referred to in the letter above mentioned.

Mrs. Stanton died 2nd August, 1905, having executed a will dated in November, 1892, by which she bequeathed to Sophia Lee the sum of $2,000 if she survived the testatrix; and in the event of her predeceasing the testatrix, she bequeathed to the plaintiff the sum of $500. Mrs. Lee died in June, 1898, so that the bequest to her of the $2,000 lapsed. The sum of $100 per annum was paid her by Mrs. Stanton from 1879 to the time of her death in 1898.

In supporting the present appeal, the plaintiff's counsel asserted that after the writing of the above letter by Mr. Murray on 9th October, 1879, Mrs. Stanton, in order to avert the threatened litigation, offered as a compromise, which was accepted, and entered into a binding agreement, to pay the $100 per annum, and to leave by her will to Mrs. Lee and her representatives a portion of her estate which would exceed the sum of $2,000.

As I have said, Mr. Murray's memory does not serve him as to what passed between him and Mr. Arnoldi in 1879, or as to the contents of the will of Mrs. Stanton, which was then in existence and referred to in his letter; he cannot speak except as to the facts and circumstances therein mentioned, which he has no doubt are correct. It becomes necessary therefore to examine the testimony of Mr. Arnoldi, which the trial Judge held fell short of establishing a binding agreement on the part of Mrs. Stanton.

Mr. Arnoldi states in effect that, after the death of Mr. Stanton in 1879, he began pressing Mrs. Stanton for the payment of the $2,000, and had one or two interviews with Mr. Murray, who was her solicitor, and received from him the letter of 9th October, 1879. That he saw Mr. Murray about that letter, and refused to accept its terms; he asked to see the will alluded to in the letter, and it was shewn to him. In one place he says it was shewn to him by Mrs. Stanton herself, in another that it was shewn to him by Mr. Murray, and that Mrs. Stanton told him she had instructed Mr. Murray to shew it to him, and that the will left a share of her estate—he thinks one-fifth—to Mrs. Lee and her re-

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presentatives. Shortly after this it happened, without intention on his part, that he was with a relative at Mrs. Stanton's house, and she spoke to him on the subject. She said she was willing to pay Mrs. Lee $100 a year as long as she lived, and that the proportion of the estate which she had left by the will would compensate, and be more than $2,000. He assured her that there would be no necessity for any litigation, that he would tell Mrs. Lee so, which he did, that the $100 a year was paid, and he heard no more of the matter until after the death of Mrs. Stanton in 1905.

Mr. Arnoldi does not say that he had any communication with Mr. Murray after this interview with Mrs. Stanton, indeed his testimony implies the contrary. His account of what passed between Mrs. Stanton and himself falls considerably short of establishing a binding agreement; but points rather to the conclusion that he was willing to rely on the probability of Mrs. Stanton not making any different provisions by her will. If he had thought of entering into a contract on the subject, knowing that Mrs. Stanton had placed the matter in the hands of her solicitor, he would no doubt have advised Mr. Murray of what had passed, and would not have left the matter to a casual conversation in Mrs. Stanton's house during a friendly call. It is to be specially observed that, according to his own account of it, he did not ask for or receive from Mrs. Stanton any promise or undertaking respecting her will. The will that was shewn to him, whether by Mr. Murray or Mrs. Stanton, was one that had been made long previous to any claim made upon her, and was purely voluntary, so that it cannot be in any way invoked to raise a presumption in favour of the position now taken by the plaintiff.

The fact that the interview in question at Mrs. Stanton's house took place 27 years before the trial, and the fallibility of human memory, especially when it is not strengthened by the only contemporaneous writing, but the contrary, would lead one to look for clear evidence of the alleged agreement. The trial Judge, who saw and heard the witnesses, came to the conclusion that such an agreement was not proved, and a careful perusal of the evidence and a consideration of all the circumstances of the case lead me to the same conclusion.

In my opinion, the appeal fails and should be dismissed with costs.

MOSS, C.J.O., OSLER and GARROW, JJ.A., concurred.

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APRIL 22ND, 1907.

C.A.

HAMILTON v. HAMILTON, GRIMSBY, AND BEAMSVILLE ELECTRIC R. W. CO.

Damages — Assessment of, by Jury — Quantum — Personal Injuries—Negligence—Elements of Damage—Appeal.

Appeal by defendants from judgment of MEREDITH, C.J., in favour of plaintiff, upon an assessment by a jury of plaintiff's damages at $7,500 in an action for personal injuries sustained by plaintiff while a passenger on defendants' railway, owing to a collision caused by the negligence of defendants.

The appeal was heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, MEREDITH, JJ.A.

J. W. Nesbitt, K.C., for defendants.

W. A. H. Duff, Hamilton, for plaintiff.

MOSS, C.J.O.:—The only question before the jury at the trial of this action was the amount of damages which it was proper to award the plaintiff.

The evidence shewed that he had suffered a most serious and painful injury, due, as was admitted, to the negligence of the defendants' servants.

In addition to the pain and suffering which he had undergone, and to which he was still to some extent subject at the time of the trial, it was shewn that he had incurred a very considerable outlay for expenses connected with the steps taken to restore his health, and further that he had suffered and was likely to suffer in future a serious pecuniary loss in the way of reduction of his income.

At the time of the accident he was in receipt of a salary of $1,800 a year, and he was also a shareholder in a business concern to the extent of $12,700, which was yielding a return in dividends of 10 per cent.

Some months after the accident, in consequence of his inability to perform the duties for which he was receiving the salary, the payment of that was discontinued, and he was obliged to dispose of his interest in the business for a sum

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which otherwise invested would not yield nearly so large a return. It was also the opinion of medical men who testified at the trial, that, although he may, and probably will, ultimately recover, it will take from two to four years before he regains his health.

All these were fair and proper elements for consideration by the jury: Phillips v. London and South Western R. W. Co., 5 Q. B. D. 78; Church v. City of Ottawa, 25 O. R. 298, 22 A. R. 248.

The jury awarded $7,500. The defendants' appeal is based on the ground that the damages are excessive, and perversely and unreasonably large, and that the jury applied the wrong measure of damages.

It was also suggested that there was a strong local feeling against the defendants which influenced the jury in finding the amount.

It is, no doubt, within the province of an appellate court to exercise a supervision over verdicts of juries in respect of damages, and if, in the judgment of the Court, the damages appear to be unreasonably large or unreasonably small, to send the matter for reconsideration by another jury. But, generally speaking, the amount of damages in a case like the present is to be considered as within the exclusive province of the jury, and their finding should not be interfered with unless the damages appear to be so unreasonably large or small as to suggest some mistake or misconduct on the part of the jury or some miscalculation or some misapprehension of the ordinary rules as to the measure of damages in the particular case.

In this case the jury had fully and clearly presented to them in the charge of the Chief Justice all the considerations and grounds which should guide them in arriving at a proper conclusion. No objection was, or, as was conceded, could be, taken to the charge.

Looking at all the evidence, it is not possible to say that the jury did in any way misapprehend the directions they received. Nor is it possible to say that the damages are so unreasonably large as to give rise to any fair suspicion that the jury were influenced by any motives outside of the circumstances of the case as presented by the evidence.

Having regard to the serious bodily injury sustained, the pain undergone, the effect on the plaintiff's health, and its probable duration, the expense incidental to attempts to effect a cure or to lessen the amount of injury, and the

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pecuniary loss sustained through inability to attend to business, it cannot be said that the jury took an unreasonable view. That being the case, we ought not to undertake to overrule their verdict, even though we should think that if we had been in their place we would have given less. But, having regard to the evidence, it is doubtful if a Judge trying the case without a jury, much less another jury, would think it reasonable to reduce the amount awarded.

Under these circumstances, the verdict should stand and the appeal be dismissed.

MEREDITH, J.A., gave reasons in writing for the same conclusion.

OSLER, GARROW, and MACLAREN, JJ.A., also concurred.

APRIL 22ND, 1907.

C.A.

HAWTHORNE & CO. v. CANADIAN CASUALTY AND BOILER INS. CO.

Insurance—Sprinkler Leakage Insurance—Policy—Construction—Exception—Loss from Frost—Payment of Premium—Authority of Agent.

Appeal by defendants from judgment of FALCONBRIDGE, C.J., in favour of plaintiffs in an action upon a policy of insurance against damage to goods by water.

The appeal was heard by MOSS, C.J.O., GARROW and MACLAREN, JJ.A.

G. H. Watson, K.C., for defendants.

G. T. Blackstock, K.C., and H. E. Rose, for plaintiffs.

GARROW, J.A:—The plaintiffs are wholesale merchants carrying on business in the city of Toronto, where the defendants have their head office.

In the month of December, 1905, they instructed Mr. Richmond, an insurance broker, to obtain for them insurance against loss resulting from accidental leakage from the

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sprinkler system of fire protection which had been recently installed in their premises.

Mr. Richmond proceeded to the head office of the defendants for the purpose of effecting such insurance, and there met a Mr. Gouinlock, the defendants' accountant, who was apparently in charge, to whom he made his application. He asked Mr. Gouinlock if the proposed insurance would cover "frost damage," and Mr. Gouinlock said it would.

He saw him more than once, and on one of the occasions, probably the second, the rate was mentioned. It was apparently finally fixed over the telephone. No mention was made, according to Mr. Richmond's evidence, and Mr. Gouinlock was not called, of an extra rate to cover the frost risk. Then an interim receipt was issued to Mr. Richmond in the name of the defendants in the following form:—

"No. 3568. Premium $30.00.

"Sprinkler Leakage Insurance Interim Receipt of the Canadian Casualty and Boiler Insurance Company, Head Office, Toronto, Canada.

"Received from D. D. Hawthorne & Co., of Toronto, the sum of thirty dollars, being the premium for twelve months from date, for insurance to the extent of five thousand dollars on merchandise....dollars on machinery....dollars on building at 24 Front street west, Toronto, against loss or damage to the property of the assured in consequence of the accidental discharge or leakage of water from the automatic sprinkler system erected in or upon the premises above named.

"The application for this insurance is subject to the approval of the directors, and if same be rejected the above premium will be returned to the address given on the application, less the proportion of the time the risk has been in force."

"Dated twenty-third day of December, 1905.

A. G. C. Dinnick,
Managing Director.

"Countersigned by
J. M. Gouinlock, Acct."

A written application was also prepared, but was not completed until some days later, after the interim receipt had issued, owing to the lack of certain information required.

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A policy was subsequently issued, on 14th February, 1906, which was sent to Mr. Richmond, but not received by plaintiffs until after the loss.

The premium was not paid at the time of the application. But an account therefor dated 12th February, 1906, was about that date sent to Mr. Richmond's firm, with a deduction of 15 per cent., the commission payable to the brokers, and the net amount, $25.50, was paid to defendants on 19th February, 1906, on the morning after the loss.

On 19th February, 1906, plaintiffs' goods were seriously injured by an escape of water from the sprinkler system, for which they made a claim under their policy.

The defendants repudiated the claim, and thereupon this action was brought, in which the Chief Justice, after hearing the evidence, found all the issues of fact in plaintiffs' favour and gave judgment for the full amount with interest, $5,133.56.

The defendants' repudiation is based upon three things:—

1. Non-payment of the premium.
2. Mr. Gouinlock's alleged lack of authority.
3. An exception in the policy of loss or damage "resulting from freezing."

I would without hesitation affirm the judgment is so far as numbers 1 and 2 are concerned. As to No. 1, there is abundant evidence that the condition requiring prepayment was waived, and that credit was given.

As to No. 2, the evidence shews clearly that Mr. Gouinlock was clothed with apparent authority to transact the defendants' usual business, as this was. As the result, and only as the result, of the interviews with him, the formal contract or policy was finally issued. And it was therefore quite too late under these circumstances, after the loss had occurred, to dispute his authority. It is not at all the same as an application at a local office to a local agent. There there is notice of limited authority—but where the dealing is at the head office, with the officer apparently in charge, it is quite a different matter.

The real difficulty in the case arises upon the third objection. It is not disputed that the pipes containing the water which by escaping did the damage, burst because of the expansion caused by the water in them having become frozen. But that cause or probable cause was, according to Mr. Richmond's evidence, expressly stipulated for as in-

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cluded in the risk, and Mr. Gouinlock was not even called to contradict him. And as it stands Mr. Richmond's unchallenged evidence would, I think, be quite sufficient to justify a finding in plaintiffs' favour, that the real contract was originally made and intended on both sides to cover the risk of loss from pipes freezing and bursting from that cause.

There is nothing, I think, in the form of the application, nor in the interim receipt, in the plaintiffs' way. The application sets out a variety of particulars. And among other questions asked and answered is this: "Protection against freezing is provided as follows.....pipes frost proof, to roof, and building steam heated;" the first section being the question and the second the answer. This, if anything, makes for plaintiffs, for if the risk in dispute was not to be insured against, it was apparently a matter of no moment how protection from freezing was provided against.

And there is nothing in the language of the interim receipt which can, I think, be said to limit or cut down the verbal contract, so as to exclude the risk in question. It is in fact entirely free from all conditions, except that the application is stated to be subject to the approval of the directors. It makes no reference to a policy to be issued, or to the terms of the defendants' usual policy, as those which are to govern. The defendants might, of course, have refused the application, but they did not do so, but, instead, issued the policy. They could not in thus accepting vary the verbal contract without the plaintiffs' consent. Such consent might, and probably would, be inferred if it could be shewn that the plaintiffs, with knowledge of the variation, had accepted the policy as a performance of the original contract. But there is no evidence to support such an implication. The burden of proving it was, of course, upon the defendants, and the only evidence they offered was the one fact that after the policy was issued it was sent to the brokers. That, in itself, and upon the evidence, was, I think, quite insufficient, it being clear that the plaintiffs had not, nor had any one for them, read the policy or ascertained that it contained any variation from the verbal contract.

In speaking of a "variation," I am for the time adopting the defendants' contention that the condition upon which they rely did vary the verbal contract, and did by its proper construction exclude a claim for loss such as that in

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question. But it is contended by the plaintiffs that, even upon the proper construction of the policy itself, the loss is not excepted, and the Chief Justice was apparently of that opinion.

The evidence shews that defendants do accept risks in which the condition now relied on is excluded, but require in such case an additional premium. There is no evidence, however, that plaintiffs knew that additional premium was required. They appear to have paid or agreed to pay the premium demanded.

The general words of the policy as to the risk covered are: against "all immediate loss or damage to the property of the assured,.....and against loss from liability of the assured for damages to merchandise held in trust or on commission, or sold but not delivered by being removed..... caused during the term of this insurance by the accidental discharge or leakage of water from the automatic sprinkler system now erected," etc.

Then under the heading of "conditions and agreements" follow a number of provisions, and among the others this: "This policy of insurance does not cover loss or damage resulting from the explosion, rupture, collapse, or leakage of steam pipes or steam boilers, nor resulting from any interruption of business or stoppage of any work or plant, nor resulting from freezing, nor resulting from fire, or violation of law," etc.

There is some evidence that the goods covered by the policy would suffer increased injury if they had been frozen after they became wet, and with other goods such as foodstuffs, fruits, and other perishable articles, the action of frost after the escape of water upon them would, one would think, be even more injurious. There are, therefore, circumstances to which the words "resulting from freezing," in what appears to be their primary sense, would apply, although that is not, I think, in strictness necessary in order to uphold the judgment. The language used in the policy and conditions is wholly that of the defendants, and it was their duty to state the exception relied on in clear terms. And very few and very simple words would have been sufficient, such for instance, as "nor caused by the rupture of a frozen pipe." They might even have used again some of the superfluous words used two lines earlier to fit the cognate case of a ruptured steam pipe. Their failure to do so, or to use words of similar import in the case of water pipes,

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is even suggestive of a deliberate desire to be obscure rather than clear, when to be clear was so simple. As was said by Lord Lyndhurst in Blackett v. Royal Exchange Assurance Co., 2 Cr. & J. 244, at p. 250: "The rule of construction as to exceptions is that they are to be taken most strongly against the party for whose benefit they are introduced. The words in which they are expressed are considered as his words, and if he do not use words clearly to express his meaning he is the person who ought to be the sufferer." See also per Lord St. Leonards in Anderson v. Fitzgerald, 4 H. L. C. 484, 507. And per Cockburn, C.J., in Fowkes v. Manchester and London Life Assurance Co., 3 B. & S. 917, 925.

Then to look briefly at some of the other circumstances which, coupled with the exceeding brevity of the exception in question, are, I think, calculated to mislead. There is first the application. In that the defendants required the plaintiffs to state how protection against freezing is secured. No doubt, the form was prepared to be used in the case of all risks whether with or without the frost risk clause. But the plaintiffs had no knowledge of that. They were not informed that there were two classes, one with a higher premium in the case of the frost risk being covered, and the other with a lower, where it was not. They paid or were willing to pay the only premium demanded, and the inquiry in the application to which I have referred was, quite apart from the verbal agreement before referred to, well calculated to give the impression that the frost risk was intended by defendants to be covered. Then the language and arrangement of the exceptions themselves is also ambiguous and misleading. The defendants first provide with clearness for the case of a bursting steam pipe causing an escape of water. Next comes the case of "interruption of business or stoppage of plant." This would, of course, be merely a consequence and not a cause of an accidental escape of water, and would, therefore, only apply to limit the damages. And next come the words in question, "nor resulting from freezing." Water freezing in a pipe (using my householder's experience) may of course cause rupture of the pipe, but that is not the invariable or inevitable result. While the "freezing" persists, no harm may be done, unless the freezing is followed by rupture. And where rupture does take place, it and not the freezing would in strictness be the proximate or at least the nearest or obvious cause. I do not,

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however, deal with the case as involving a question of proximate cause, but purpose merely to examine the language of the exception in its surroundings to see if by its use the defendants have reasonably complied with their duty to clearly inform the insured of the exception for which they now contend.

The clause as to freezing is followed by what is to me an exceedingly ambiguous exception in the case of fire. Fire as the result of an accidental escape of water is inconceivable. If the exception means anything, it must therefore mean fire which causes an accidental escape of water.

The whole object of the sprinkler system is to quench fire. And it is at once put in automatic operation by the presence of fire on the premises, so that an escape of water so caused would certainly not be accidental but intentional. The only possible operation of this exception would therefore be in the unlikely case of an external fire so fierce as to set the automatic sprinkler system in motion, but not fierce enough to set the building on fire.

In this jumble of cause with effect and of precision with obscurity, it is not at all wonderful that the ordinary merchant should fail to discover the extended meaning which the defendants now say lurks in the words "caused by freezing." If he read with great care he might possibly be in doubt, but he is entitled according to a great and uniform mass of authority not to doubt, but to clearness. And without differing from the construction of the Chief Justice, it is, I think, quite sufficient to dispose of the case to say that defendants have not, in my opinion, expressed the exception as to frost in terms reasonably clear and sufficient to have the effect given to them of limiting the obligation arising from the general words of the contract.

For these reasons the appeal should, in my opinion, be dismissed with costs.

MACLAREN, J.A., agreed in the result, for reasons stated in writing.

MOSS, C.J.O., agreed in the result.

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APRIL 22ND, 1907.

C.A.

BOULTER-DAVIES CO. v. CANADIAN CASUALTY AND BOILER INS. CO.

Insurance—Sprinkler Leakage Insurance—Policy—Construction—Exception—Loss from Frost—Payment of Premium—Authority of Agent.

Appeal by defendants from judgment of FALCONBRIDGE, C.J., in favour of plaintiffs in an action upon a policy of insurance against damage to goods by water.

The appeal was heard by MOSS, C.J.O., GARROW and MACLAREN, JJ.A.

G. H. Watson, K.C., for defendants.

G. T. Blackstock, K.C., and H. E. Rose, for plaintiffs.

GARROW, J.A.:—The facts in this case, while not exactly similar to those in the case of Hawthorne against these defendants, so much resemble them that no statement of them need here be made. The application and the policy and conditions are alike in both. The plaintiffs here, however, had no prior verbal agreement respecting the frost risk. They had also received the policy some weeks before the loss—and should under the circumstances be assumed to have read it.

Their right to recover must therefore rest wholly upon the question of the construction of the so-called exception "resulting from freezing." And the construction must necessarily be the same in both cases, so that what I have said in the other case would apply in this as expressing my opinion that the judgment should be affirmed and the appeal dismissed with costs.

MOSS, C.J.O., agreed in the result.

MACLAREN, J.A., dissented, for reasons stated in writing.

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CARTWRIGHT, MASTER. APRIL 23RD, 1907.

CHAMBERS.

HUNTER v. BUCKNALL.

Mines Act—Appeal from Decision of Mining Commissioner —Notice of Appeal—Time for—Solicitors—Next Sitting of Court—Setting aside Notice—Extension of Time for Appeal.

Motion by defendants Bucknall to set aside a notice of appeal given by plaintiff against a decision of the Mining Commissioner, pursuant to sec. 30 of the Mines Act.

G. B. Strathy, for the applicants.

T. Herbert Lennox, for plaintiff.

THE MASTER:—The motion is made on three grounds:—

1. That the notice was given by solicitors who are not the plaintiff's solicitors on the record.

This is admitted, but appears to have been caused by a mistake of the clerk who drew and served the notice.

2. That it was served too late, viz., at 4.50 p.m., of 17th April instant; the decision of the Commissioner having been filed on the 2nd instant.

Section 30 of the Mines Act requires an appeal to be brought within 15 days, and sec. 35 makes the Rules and practice of the High Court of Justice applicable to this Act.

3. The notice appealed from was given for the "next sittings of a Divisional Court *commencing on or about the 22nd April, 1907.*"

Possibly, if this was the only objection, it might be held under the principle of Rule 312 that the words italicized might be struck out as surplusage.

However that may be, it seems clear that the second objection is entitled to prevail under Rule 349; and that the plaintiff having in some way allowed the time for appealing to go by, his only course now will be to make an application to a Divisional Court or a Judge thereof to extend the time for appeal, as provided by sec. 30 of the Mines Act.

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The first objection might possibly have been curable, as well as the third. But the second is excepted from the jurisdiction of the Master in Chambers by sec. 3 of Rule 42.

The motion must therefore be granted with costs to defendants in the cause.

BOYD, C. APRIL 23RD, 1907.

WEEKLY COURT.

RE CANADA CABINET CO.

Company—Winding-up—Mortgage by Company—Summary Foreclosure — Winding-up Act, sec. 39 — Other Incumbrancers—Leave to Bring Action—Costs.

Motion by the corporation of the town of Gananoque for payment out of Court of $10,000, or for foreclosure of the company's interest in lands mortgaged to the applicants, the company being in liquidation.

E. D. Armour, K.C., and W. B. Carroll, Gananoque, for the applicants.

H. Cassels, K.C., and J. A. Jackson, Gananoque, for the liquidator.

BOYD, C.:—It appears to me that the scheme of the Winding-up Act contemplates that the summary action provided for under sec. 39 as to mortgages on land may be properly exercised only when the liquidator is the sole party interested in the property mortgaged. If it is a case of prior or of subsequent mortgagees, other provisions of the statute point to an efficient way of dealing with such complications. I refer particularly to sec. 63, which, though directly concerned with cases of secured creditors valuing their claims, indicates the protection intended to be afforded to other incumbrancers on the same property. If the claim so secured is valued, the Act provides an expeditious way of dealing with it and protecting all interested parties. But such a result and method of dealing is not provided or indeed contemplated by sec. 39, where the case is provided for of one mortgage which may be summarily litigated and realized as against the officer of the Court. Henderson v. Kerr.

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22 Gr. 91, indicates this difficulty as to subsequent incumbrancers which existed in the original clause from the Insolvent Act—a clause which has been carried on into the Winding-up Act as sec. 39. The point is considerably discussed in various aspects under bankruptcy procedure in Ex p. Cutts, 3 Mont. & Ayr, at pp. 549 and 580.

In all the circumstances, I think the best and safest course is to allow an action to be brought by the mortgagees, and I give no costs of this application, save the costs of the order to sue, which may form part of the mortgagees' costs.

APRIL 23RD, 1907.

DIVISIONAL COURT.

BRADLEY v. TOWNSHIP OF GAINSBORO.

Distress—Taxes—Controversy as to Amount Due—Excessive Distress—Special Damage—Costs.

Appeal by defendants from judgment of MABEE, J., ante 397.

H. H. Collier, K.C., for defendants.

G. H. Pettit, Welland, for plaintiff.

THE COURT (MULOCK, C.J., MAGEE, J., CLUTE, J.), dismissed the appeal with costs.

RIDDELL, J. APRIL 24TH, 1907.

CHAMBERS.

RE SMITHERS.

Dower—Conveyance of Land Free from — Dispensing with Concurrence of Wife—Circumstances Disentitling to Alimony—Prostitute—Right to Value of Dower.

Application under sec. 12 of the Dower Act, R. S. O. 1897 ch. 164, for an order permitting the applicant to con-

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vey the south half of the south half of lot 19 on the 3rd concession (Rideau front) of the township of Gloucester, free from the dower of his wife, in the circumstances mentioned below, without concurrence on her part.

A. H. Armstrong, Ottawa, for the applicant.

RIDDELL, J.:—The evidence discloses an extraordinary and a very painful story. The applicant, a labouring man, who is the owner of the land in question, married his wife in 1892, and husband and wife lived harmoniously together for two years, one child, a girl, being born to them. When the child was about 8 months old, one day, while the husband was away at his work, the wife left her house and deserted husband and child without any cause and without having previously stated her intention of leaving. She went to Montreal, and placed herself in the hands of a procuress, who sent her to Chicago, and there the unfortunate woman lived a life of open shame in a house of prostitution for some 6 weeks. She then wrote to her mother, who interceded with the husband, and the husband received back his erring wife to his home and arms.

Before the expiration of one year the woman again left her home under similar circumstances, again went to Montreal, and was again by a procuress sent to Chicago. This time she was arrested at the instance of the Society for the Prevention of Vice, and was released upon her promise to return to Montreal. She did so, and, upon the intercession of her relatives, she was again received back by her husband. Within a few months she again left and went to Montreal, and upon this occasion went to a house of prostitution in Montreal and lived there as a common harlot. Then the husband sought her out with the assistance of her relatives and brought her back home, but again she left and went to the same course of life. This took place several times—she, when brought home, would remain but a few weeks or months at the most and then return to her life of sin.

For the 4 years and 3 months previous to the application, she had not returned to her husband, nor had she lived with him. Inquiries made in Montreal disclosed the fact that she had left Montreal, but no trace has been discovered or her present condition or residence; and her relatives either do not know or are not willing to tell where she has gone to.

These being the facts, it is clear that this is a case "where the wife of an owner of land has been living apart

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from him for 2 years under such circumstances as by law disentitle her to alimony." The applicant having made an agreement for a sale of the land in question, he is, under R. S. O. 1897 ch. 164, sec. 12, entitled to an order dispensing "with the concurrence of the wife for the purpose of barring her dower"—and such an order I made upon the argument at Ottawa.

I reserved judgment that I might consider whether the order should contain an award of the value of dower and a direction as to the disposition to be made of this; and that depends upon whether "the wife has been so living apart from her husband under such circumstances as disentitle her to dower."

The wife has been living in open avowed adultery, and so is not entitled to alimony, but does that disentitle her to dower?

Blackstone, Bk. II., p. 136, correctly tells us that at the common law adultery will not disentitle a wife to dower. "Yet," he continues, "now by stat. West. II. (13 Edw. I. ch. 34), if a woman voluntarily leaves (which the law calls eloping from) her husband, and lives with an adulterer, she shall lose her dower, unless her husband be voluntarily reconciled to her." . . .

[Reference to 2 Inst. 435; Woodward v. Dowse, 10 C. B. N. S. 723; Cook v. Berty, 12 Mod. 232; Bostock v. Smith, 34 Beav. 57.]

In the case under consideration, we have nothing in the way of a continuous living with one man in adultery. The woman had no lover; she eloped from her husband simply and solely because of her desire to live the life of a prostitute, this desire itself being the outcome, no doubt, of a well known form of mental and physical disease of which a classic instance may be found in the case of the Empress Messalina, who came under the lash of the satirist from her frequenting night after night the brothels of ancient Rome.

It is necessary to consider whether the statute covers the present case, our Dower Act being silent. The older cases usually referred to are collected in Hetherington v. Graham, 6 Bing. 135. . . .

Our Court of Common Pleas in 1857 held, but with doubt, that if the husband abandon his wife and children without making any provision for her or their support, the wife does not by subsequently committing adultery lose her dower under the provisions of the stat. West. II.: Graham v.

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Law, 6 C. P. 310, 314. . . . This case was, however, decided before Woodward v. Dowse and Bostock v. Smith, and it was, on the authority of the former case, expressly overruled in the same Court in the cases of Woolsey v. Finch, 20 C. P. 132, and Neff v. Thompson, ib. In all these cases, however, there was the continued living in adultery with the one man, adultero suo.

I have found no case either in England or Canada in which there was not a defined person with whom the wife "tarried." But the reasons given for the various judgments in England make it clear that in this case the wife is not entitled to dower.

Bound as I am (Trimble v. Hill, 5 App. Cas. 342, 344) by these judgments . . . I must hold as I have done. Were the case res integra, I should be inclined to consider that the tarrying must be of a more permanent character, and that a mere miscellaneous cohabitation with all comers was not what the Act contemplated. I should have thought that the "adulter" must be rather more "suus."

The order will contain no direction as to dower.

BOYD, C. APRIL 24TH, 1907.

CHAMBERS.

STUART v. BANK OF MONTREAL.

Pleading — Statement of Claim—Amendment—Alternative Cause of Action—Leave to Set up.

Appeal by plaintiff from order of Master in Chambers, ante 741, refusing to allow plaintiff to amend her statement of claim.

W. J. Elliott, for plaintiff.

W. E. Middleton, for defendants.

BOYD, C.:—To the action for account the defendants plead a settlement and release given and made by the plaintiff in 1904. The plaintiff replies that the said release was not given with intent to bar her right to account, and asks rectification. Now the application is to amend the

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claim by impeaching the right of the defendants to hold the securities in question, because obtained from plaintiff by undue means. The amendments may be so framed as to make this the primary attack, and then, failing that larger relief, to claim in the alternative that the accounting still be had as originally sought on the record. A pleading so framed at the outset would be maintainable as against legal objections, and it does not appear to me too late now to permit such change to be made by way of amendment. The subject matter of controversy is still the same, but will be of enlarged scope under the amendment. Relief is claimed in respect of the dealings by the plaintiff as surety for her husband with the bank. It is conceded that a defendant might be permitted so to amend the pleadings; no sufficient reason appears to me to exist to forbid such relief to a plaintiff in the circumstances of this case. An entirely new case for the plaintiff was allowed to be raised by amendment at the trial in Budding v. Murdoch, 1 Ch. D. 42. So a plaintiff was allowed to set up a case of fraud after the defence was closed in a will case, Riding v. Hawkins, 14 P. D. 56. A change of base was allowed to be made by a plaintiff in Chevalier v. Ross, 3 O. L. R. 219, 1 O. W. R. 12, 115, and see generally Kurtz v. Speer, 6 Ch. D. 774.

Altogether, instead of dividing the causes of complaint into separate actions, I would allow this amendment on payment of all costs occasioned by the application in Chambers, but no costs of appeal.

BOYD, C. APRIL 24TH, 1907.

WEEKLY COURT.

RE QUAY.

Will—Construction—Bequests—Conditions—Validity.

Motion by Thomas John Franklin Quay, a legatee under the will of William Quay, for an order under Rule 938 determining certain questions arising upon the will.

The testator devised and bequeathed all his estate to his executors in trust for the purposes mentioned in the will.

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The construction of the following provisions of the will was desired:—

"I hereby direct my said executors and trustees to give to my son Thomas John Franklin Quay $15,000, on the following conditions, viz., he shall personally appear before my said executors in Port Hope before receiving any part thereof. He shall not be engaged in malt or spirituous liquor traffic or in any form of gambling or games of chance directly or indirectly personally or through an agent or partner, and he shall only participate in my residuary estate on same conditions, and he shall furnish my executors yearly with a reasonable proof that he is strictly observing the above conditions."

"I hereby direct my said executors and trustees to give tc my son William Frederick Aiken Quay the sum of $5,000 as follows, viz., $500 five years after my decease and $500 each year thereafter for 9 years, but before receiving any part thereof he shall appear personally before my executors in Port Hope."

There was no gift over, and the sons Thomas and William were among the residuary legatees.

E. D. Armour, K.C., and J. D. Montgomery, for the applicant.

F. H. Kilbourn, Owen Sound, surviving executor, in person.

M. C. Cameron, for infants and unborn issue.

Boyd, C.:—I think the fair reading of the will negatives the conclusion that a vested estate is given to Thomas. The testator requires that he shall, if physically and mentally able, be engaged in some honourable occupation or calling, and excludes from such category the liquor traffic and the pursuit of gambling as a means of livelihood. He is to supply reasonable evidence yearly of not being so engaged, and that is in furtherance of good morals. It was conceded on the argument, and I think rightly, that the whole tenour of the will gives an interpretation to the phrase used, "any form of gambling or games of chance," as not referring to playing games by way of diversion or amusement, but of making that the staple of his daily occupation.

Thus reading the will, I do not take it that this condition is to be construed as merely in terrorem, but as a com-

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petent direction in furtherance of public interests, which should be observed as a condition of being paid the testator's pecuniary bequests.

As to the other beneficiary, William, it is requisite, I think, that he should appear once in person before the executor as directed, and that no further appearance is contemplated or exacted.

This ruling substantially covers, as I understand, all the matters inquired of on the application.

Costs out of the estate.

Besides the cases cited I have referred to Lloyd v. Lloyd, 2 Sim. N. S. 253, and Galway v. Burden, [1899] 1 Ir. 508, which afford some light on the points discussed.

CARTWRIGHT, MASTER. APRIL 25TH, 1907.

CHAMBERS.

AMES-HOLDEN CO. v. COCHRANE.

Writ of Summons—Defect in Copies Served—Not Addressed to Defendants — Order Validating Service — Costs.

Motion by defendants to set aside the writ of summons and service, on the ground that the copies of the writ served upon the defendants were defective in not being addressed to any one.

Eric N. Armour, for defendants.

J. A. Macintosh, for plaintiffs.

THE MASTER:—The writ was correct, but not the copies. This is the only ground of those taken in the notice that was pressed. In support State Savings Bank v. Columbia Iron Works, 6 O. L. R. 358, 2 O. W. R. 733, was cited.

In answer Mr. Macintosh relied on Dickson v. Law, [1895] 2 Ch. 62; but the facts there do not seem to be similar to those of the present case. It is no mere technical defect here, as it was in that case.

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The omission of any address to the defendants, taken in conjunction with the other peculiarities of the copies served, would seem to have justified the motion.

While, therefore, the service may properly be validated as of this date, the costs should be to defendants in the cause.

The style of the cause does not assist the plaintiffs. In the writ proper the word "defendants" does not occur, so that unless the persons named in the style of the cause as defendants are mentioned after the word "To . . ." there is no one to whom the King commands anything.

MULOCK, C.J. APRIL 25TH, 1907.

WEEKLY COURT.

RE DUNCAN AND TOWN OF MIDLAND.

Municipal Corporations — Local Option By-law — Time for Finally Passing by Council—Necessity for Expiry of 2 Weeks from Declaration of Result of Vote — Liquor License Act — Municipal Act — Invalidity of By-law—Quashing.

Motion by Duncan to quash a local option by-law of the town of Midland.

J. B. Mackenzie, for the applicant.

F. E. Hodgins, K.C., for the town corporation.

MULOCK, C.J.:—The voting took place on 7th January. 1907. Upon 8th January the clerk of the council declared the result of the voting, and upon 14th January the council purported to pass the by-law. The clerk's certificate shewed that 477 votes were cast in favour of and 234 against the proposed by-law, the vote in its favour thus exceeding the required three-fifths majority.

Objection is taken that the council had no power to pass the by-law until the expiry of 2 weeks from the declaration by the clerk. . . .

Sub-section 1 of sec. 141 of the Liquor License Act declares that every council may pass such a by-law "provided

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that the by-law before the final passing thereof has been duly approved by the electors of the municipality in the manner provided by the sections in that behalf of the Municipal Act."

Sub-section 4 of sec. 24 of the Act to amend the Liquor License Act, being ch. 47 of 6 Edw. VII., which repeals sub-sec. 2 of sec. 141 of the Liquor License Act, declares that "in case three-fifths of the electors voting upon such by-law approve of the same, the council shall within 6 weeks thereafter finally pass such by-law, and this sub-section shall be construed as compulsory, and the duty so imposed upon the council may be enforced at the instance of any municipal elector by mandamus or otherwise." . . .

The sections of the Consolidated Municipal Act, 1903, bearing upon the subject are as follows:—

"338. In case a by-law requires the assent of the electors of a municipality before the final passing thereof, the following proceedings shall, except in cases otherwise provided for, be taken for ascertaining such assent."

"369. If within two weeks after the clerk of the council which proposed the by-law has declared the result of the voting, any elector who was entitled to vote upon the by-law applies upon petition to the County Judge, after giving such notice of the application and to such persons as the Judge directs, and shews by affidavit to the Judge reasonable grounds for entering into a scrutiny of the ballot papers . . . the Judge may appoint a day and place within the municipality for entering into the scrutiny."

"370. At least one week's notice of the day appointed for the scrutiny shall be given by the petitioner to such persons as the Judge directs, and to the clerk of the municipality."

"371. On the day and at the hour appointed the clerk shall attend before the Judge with the ballot papers in his custody, and the Judge, upon inspecting the ballot papers and hearing such evidence as he may deem necessary, and on hearing the parties, or such of them as may attend, or their counsel, shall in a summary manner determine whether the majority of the votes given is for or against the by-law, and shall forthwith certify the result to the council."

"374. In case of a petition for a scrutiny being presented, the by-law shall not be passed by the council until after the petition has been disposed of, and the time which intervenes between the presenting of the petition and the

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final disposal thereof shall not be reckoned as part of the 6 weeks within which the by-law is to be passed."

The effect of the amending sub-sec. 4 . . . is to require approval of the by-law by a majority of three-fifths, instead of, as formerly, by a bare majority of the electors voting upon it, and to declare that the council may be compelled by mandamus or otherwise to pass the by-law so approved within 6 weeks after it shall have received such approval; but the amendment does not repeal the proviso to sub-sec. 1 of sec. 141, which declares that before the by-law is finally passed it shall have received the approval of the electors in manner required by the sections in that behalf of the Municipal Act. Thus, in the case of a local option by-law, the amending sub-sec. 4 . . . is substituted for sec. 373 of the Municipal Act. The other sections referred to, viz., 369, 370, 371, and 374, are left in full force; and the question is, whether, having regard to these sections and the amending sub-sec. 4 . . . . the council had power to pass the by-law at the time when they purported to do so, viz., within 7 days after the clerk had declared to them the result of the voting.

The intention of the legislature was, I think, that before the council acted upon the declaration of the clerk by "finally" passing the by-law, an interval of 2 weeks should be allowed to the electorate within which to investigate the correctness of the declaration by applying for a scrutiny, and that in the interval the by-law should remain in that stage which would enable the council to give effect to the finding of the Judge. . . .

I fail to see what useful purpose would be served by the Judge certifying the result (sec. 371), if the council had already finally passed the by-law. . . .

Then the language of sec. 374 . . . implies that the by-law has not been passed at the time when the petition is disposed of, and the concluding words of sec. 374 . . . extending the time for passing the by-law, indicate that the disposal of the petitions must precede the passing of the by-law.

Whether in fact a petition is presented within the two weeks seems to me immaterial. The electors are given that time within which to present it, and until the expiry of that time the by-law must not have been finally passed, otherwise it is impossible to give effect to sec. 374, should a petition

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be presented within the two weeks but after the final passing of the by-law.

The legislature evidently intended to afford the electors an opportunity for a scrutiny before the result of the voting became operative, and it did not, I think, contemplate empowering the council to defeat such intention by finally passing it within the two weeks, and before a petition for a scrutiny should be presented; otherwise it would be a simple matter for any council, favourable to the by-law, with the assistance of a sympathetic clerk, to finally pass it before the electors had definitely learned the result of the voting or had been able to present a petition.

If such a passing were valid, the presentation thereafter of a petition for a scrutiny would be purposeless. The scrutiny might take place and shew that the by-law had not received the required majority, but the Judge's certificate to the council, informing them of the result, would not repeal the by-law. I am unable to discover any intention on the part of the legislature to deprive the electors, in the case of a voting on a local option by-law, of the right to a scrutiny, or to make the clerk the only and final judge as to whether the by-law has or has not received the required statutory majority, and I am of opinion that a municipal council has no power to finally pass a local option by-law within the two weeks next after the clerk of the council has declared the result of the voting.

For these reasons, the by-law is, I think, invalid, and should be quashed with costs. . . .

RIDDELL, J. APRIL 25TH, 1907.

TRIAL.

LOUDEN MANUFACTURING CO. v. MILMINE.

Infant—Purchase of Goods—Action for Price—Defence of Infancy—Alleged Ratification after Majority—Letter Acknowledging Account — Insufficiency — Re-sale of Goods after Majority—Dismissal of Action—Costs—Partnership.

Action against two defendants, father and son, for the price of goods sold to the son.

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R. L. McKinnon, Guelph, for plaintiffs.

G. C. Thomson, Hamilton, for defendants.

RIDDELL, J.:—The action is for the price of certain articles of merchandise sold to the son, on the son's sole credit, and charged to him in the books of plaintiffs. It was sought to make the father liable either as an actual partner of his son or from his holding himself out as such partner. At the trial I held that the father was not liable, and the action must be dismissed against him with costs.

As regards the son, the plea of infancy was set up, to which was answered ratification after full age. The document relied upon is a letter written by the son, in answer to one by the solicitors for plaintiffs; the latter was as follows:—

"Messrs. William S. Milmine & Alex. Milmine,
Grassey Corners, Ont.

"Dear Sirs: We have been instructed to demand prompt payment from you of $287.68 owing to the Louden Manufacturing Co. We have to ask that you will give this your immediate attention, as our instructions are peremptory. Remittance will be made to our office. Yours truly, McKinnon & Howitt."

The answer of the son is as follows:—

"Grassie, Jan. 26, '07.

"McKinnon & Howitt, Guelph, Ont.

"Dear Sirs: Your letter of 23rd inst. received and contents noted, and in reply I would say that the company have apparently misinformed you relative to my"—the word had originally been written "this"—"account. As to your reason for putting Alex. Milmine's name on my letter I do not know, but I would kindly ask for an explanation from you, and it will be to the best interest of company if they give you the right explanation of this case, and not try such high-handed tricks as apparently they are trying to work. Yours truly, Wm. S. Milmine."

Does this letter—silly, bumptious, and ill-mannered as it is—constitute a ratification within the statute?

I adopt as the test what is said by Rolfe, B., giving the judgment of the Court in Harris v. Wall, 1 Ex. 122, 130: "Any act or declaration which recognizes the existence of the promise as binding is a ratification of it, as in the case of agency—anything which recognizes as binding an act

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done by an agent, or by a party who has acted as agent, is an adoption of it. Any written instrument, signed by the party, which in the case of adults would have amounted to the adoption of the act of a party acting as agent, will in the case of an infant who has attained his majority amount to a ratification."

This was followed by the Court of Exchequer in Manson v. Blane, 10 Ex. 206, by the Court of Queen's Bench in Rowe v. Hopwood, L. R. 4 Q. B. 1, and in the Chancery Division in In re Hodson, [1894] 2 Ch. at p. 425. But these cases point out the necessity of the recognition by the debtor of the debt, not simply as an account of goods received by him, but as a debt binding upon him. And in MacCord v. Osborne, 1 C. P. D. 568, it was held that the acknowledgment after majority by an indorser of a note and a promise to pay it as a debt of honour was not a ratification within the statute. . . .

Rowe v. Hopewood, L. R. 4 Q. B. 1, is the case nearest to this which I have found. . . . I think the present case is much weaker for the plaintiffs. . . . No doubt there is a recognition that an account exists and that it has been charged against the defendant, but there cannot be imported into the writing "a recognition of an existing liability," "an enforceable promise," without a "straining of the meaning of the document signed by the debtor."

But, it was argued, after defendant came of age he retained and sold certain of the goods, and this gives plaintiffs a cause of action for at least so much of the goods as he had in hand at majority. I cannot follow this argument. If the act of the defendant be claimed as a ratification, it was not in writing, as required by the statute—plaintiffs do not and did not claim to rescind the contract of sale, but affirm the contract and insist that defendant should pay the price of the goods; that right can exist in a case like the present only if the defendants owns the goods, i.e., if the property has passed. There is no pretence of fraud, and I cannot see that any action in the nature of trespass, trover, or assumpsit for goods bargained and sold, or for money had and received, can lie.

The action should be dismissed.

As to costs; perhaps in ordinary circumstances the dismissal would be without costs. Here, however, to his credit be it said, the defendant (the son) offered in open court to consent to a judgment against him if plaintiffs would not

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press the claim against his father. This was refused, and plaintiffs stood upon their strict rights. They cannot complain, then, if defendant should have also the benefit of the rigour of the law.

The action will be dismissed with costs on the High Court scale to both defendants.

CARTWRIGHT, MASTER. APRIL 26TH, 1907.

CHAMBERS.

McKAY v. TORONTO R. W. CO.

Pleading—Statement of Claim — Amendment — Abandonment of Part of Claim after Trial—New Trial Directed —Reduction of Amount so as to Prevent Appeal to Privy Council—Workmen's Compensation Act—Allegations of Facts Proved at Trial—Terms of Amendment—Costs.

Motion by plaintiff for leave to amend the statement of claim by reducing the amount claimed for damages from $20,000 to $3,900, and by setting out facts which would shew a cause of action under the Workmen's Compensation for Injuries Act.

H. E. Rose, for plaintiff.

A. B. Morine, for defendants.

THE MASTER:—The action has been tried, and a new trial has been ordered by the Court of Appeal. An appeal from the judgment of that Court to the Supreme Court of Canada has been quashed. Defendants are desirous of pressing their contention that the action should be dismissed. and wish to take the case on this point to the Privy Council. It is admitted that plaintiff's object in reducing the claim for damages is to prevent this being done. On the other hand, unless it was going to have this effect, defendants would not be interested in opposing it.

The exact point seems covered by the decision of Garrow, J.A., in Preston v. Toronto R. W. Co., 13 O. L. R. 79, 8 O.W.R. 753. That judgment went on the abandonment before the learned Judge of all claim in excess of $1,000 for damages, and it was held that a plaintiff in a Superior Court may at any stage abandon a part of his claim, and thereafter only the remainder can be said to be in controversy. This decision cannot be questioned short of a Divisional Court.

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On the other point there is no doubt that plaintiff must be allowed to amend. The only question is one of terms. The statement of claim alleged generally a cause of action both at common law and under the Workmen's Compensation Act, but gave no facts to support the latter.

It is desired now to set out the negligence of the motorman in not putting on his brakes before coming to the Grand Trunk Railway crossing, where plaintiff's husband, the conductor, was killed. It seems that evidence was, without objection, given on this point at the trial . . . but no amendment was asked for. . . . The first question left to the jury, without objection, was this: "Was the conductor's death the result of any negligence of the company or of the motorman?" The jury said "yes" to the former part, but said nothing as to the motorman.

Under this state of facts, it seems right to allow the amendment asked for to be made without any restriction such as was thought proper in Hogaboom v. MacCulloch, 17 P. R. 377—as the case went to the jury substantially as if the amendment had been made.

The costs of and in any way occasioned by this order must be to defendants in any event.

RIDDELL, J. APRIL 26TH, 1907.

WEEKLY COURT.

RE ARMOUR AND TOWNSHIP OF ONONDAGA.

Municipal Corporations—Local Option By-law—Voting on —Majority—Computation—Illegal Votes—Owners—Farmers' Sons — Forms of Oaths — Qualifications of Voters — Deputy Returning Officers — Deprivation of Right to Vote—Effect on Result—Township By-law—Application to Indian Reserve Forming Part of Township —Formal Objections—Publication of By-law—Name of Newspaper—Time of Voting—Three Weeks after First Publication—Computation—Irregularities in Meeting of Council—Final Passing of By-law—Time for—Scrutiny —Election of Council—Declaration of Councillors.

Application to quash by-law No. 201 of the township of Onondaga, a local option by-law, upon the various grounds set out in the judgment.

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J. B. Mackenzie, for the applicant.

W. S. Brewster, K.C., for the township corporation.

RIDDELL, J.:— . . . 1. The votes for the by-law were 152, against 91, in all 243; the by-law required under 6 Edw. VII. ch. 47, sec. 24, to have in its favour three-fifths of 243 = 146 votes—so that it will be seen there were 6 votes to spare. It was argued that about 19 votes were bad, and that it required only 10 votes to be proved invalid (as 6 = 3/5 of 10), that the majority should be wiped out. This is bad arithmetic, and therefore bad law. It reminds one of the familiar calculation whereby school boys prove 1 = 2. The proper course to pursue, if any, when votes are proven to be improperly cast is to deduct these votes from the total, and then take three-fifths of the remainder. In this case a simple calculation shews that it requires a reduction of 16 votes from the successful side to overcome the majority, thus:

Votes for by-law.....152—16 =	136
Votes against by-law....	91
Total	227

3/5 of 227 = 137 (136.2).

While if only 15 be struck off, we have

Votes for the by-law...152—15 =	137
Votes against by-law ..	91
Total....	228

3/5 of 228 = 127 (136.8).

I do not find it necessary to consider anew the question whether I have the power of examining into the propriety of the various names being on the voters' list; or whether I am not bound, under sec. 89 of the Act of 3 Edw. VII. ch. 19, to hold that no such inquiry may be entered into. That is decided by such cases as Regina ex rel. McKenzie v. Martin, 28 O. R. 523.

It is contended, however, that many should never have been on the list at all; and that many who may properly have been on the list at the final revision lost their qualification before the election. I shall pursue so far as necessary the latter inquiry.

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No. 14, it is said, though entered on the list as owner, was in reality only a "farmer's son," living with his father, the real owner. After the final revision, but before the day of the election, his father died and left him the land, whereby he became an owner in fact. I think that, as an intending voter may select any form of oath of those given in the statute (see sec. 116), and that no others are to be required of him, once his name is on the voters' list, he may vote if he can truly take any form. No. 14 could truly swear that at the date of the election he was in his own right a freeholder, &c., as the form in sec. 112 requires.

No. 15 is entered as an owner, though it is said that he also was in the same position as his brother just mentioned. He received no property by the will, but he could swear that at the date of the final revision, &c., the deceased was actually owner of the land, and that he (No. 15) was his son, and has resided on the property for 12 months next before the said day, &c., &c., as required by sec. 115. It is to be noted that the Act does not require the farmer's son to live with the owner of the farm, but on the farm: sec. 86 (*1*); and sub-sec. (b) seems to contemplate a case in which the father may be dead.

No. 54. Here the son is entered as owner with his father of certain land, though it is alleged that he should have been entered if at all as a farmer's son. The father sold this land after the final revision, but before the election. No. 54 can still honestly take oath (sec. 115)—the form not requiring the farmer to continue to be the owner of the farm after the final revision.

No. 315. This voter is living with his mother on land for which he and others are assessed as owners. The mother has an estate for life in this farm, with power to appoint to a class, of whom No. 315 is one. She is, therefore, an "owner," as she is the "proprietor of an estate for life." No. 315 then is a farmer's son. No. 314 is in the same condition. No. 311 is entered also as an owner, though it is said he should have been entered as a farmer's son. He becomes a tenant, and it is argued that therefore he lost his status as a farmer's son, as a "farmer's son" can only by the statute be a person "not otherwise qualified to vote." But he cannot lose his status without becoming otherwise entitled to vote; and I find no suggestion in the statute that one who has been a farmer's son at the time of the final revision, and who can honestly take the oath in sec. 115,

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loses his right to vote as a farmer's son by acquiring property as tenant or as owner.

No. 321. Under age at the time of the final revision and for more than 60 days thereafter, but of age at the time of the election. This vote is good—all the forms of oath contain the clause "that you are.....of the full age of 21 years." I may say, in passing, that this was so held in the South Perth Election Case, by Street and Meredith, JJ.

No. 59 actually lives with his father upon the farm of the latter, though he does no work, it is said, on the farm, but carries on business for himself as a blacksmith in the hamlet of Onondaga. The statute does not require the son of a farmer to work on the farm, but only to reside on the farm in order to qualify as a "farmer's son." If No. 59 were a sluggard and lived on the farm and on his father, he might be allowed to vote, and I do not think the statute penalizes industry.

No. 76. Nos. 74 and 75 are owners in common of a farm. No. 76 is the son of one of these, and it is objected that, as Nos. 74 and 75 together are the owners of the land, No. 76 could not qualify unless he were the son of both. This argument I do not accede to. An owner is a person who is proprietor in his own right of an estate for life or any greater interest in any land—it does not exclude all but those having the whole fee simple. No. 74 is such an owner, and may have his sons put on the voters' list without resort to the polyandry of Thibet.

No. Jos. D.—put on after the first roll was made up —admittedly has qualification at the time of the final revision and of the election, as he received a conveyance of his land on 30th June. In any case, he "at the date of the election" was a freeholder, and that is sufficient.

No. 139, assessed as owner, but sold out after the final revision; he, however, acquired other property, and so at the time of the election could take the oath in sec. 112.

Of the above I cannot see the slightest doubt in Nos. 14, 59, 76, 139, 311, 314, 315, 321, or No. J. D.—9 in all; and but little in Nos. 15 and 154. Objection was taken to 20 names, and also to the 2 deputy returning officers, in all 22. There can, I think, be no doubt as to 9, leaving 13 as possibly doubtful. So that, even if we were to give all these as voting for the by-law, the necessary three-fifths has been obtained.

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2. As to the deputy returning officers, it is said that they voted, and that under 3 Edw. VII. ch. 19, sec. 351, the provisions of sec. 179 are excluded in voting on such by-laws as this, and that sec. 179 is the only section which can be found giving deputy returning officers the right to vote. It is answered that sec. 347 of the Act of 1903 contemplates that the deputy returning officers shall have the right to vote. I do not think so. Section 347 is simply sec. 347 of the R. S. O. 1897 ch. 223; this R. S. O. ch. 223 contained a section, 351, in the same terms as the present sec. 351, but without the words "except section 179—" these words having been introduced by 3 Edw. VII. ch. 18, sec. 74. The amendment of 1903 takes away from the deputy returning officers the right to vote on such by-laws as this, which they enjoyed before that amendment. The section 347 was not amended; and still applies to cases of elections where the deputy returning officers may vote. But the number of deputy returning officers is only two, so that the result of the election is still to give three-fifths of the electors voting in favour of the by-law.

3. It is said that the by-law, being for the township of Onondaga, should be considered as intended to be in force throughout the whole township; that a considerable portion of the township is an Indian reserve, and therefore the by-law is ultra vires. It is sufficient to say that it is not contended that this by-law is or can be valid in the Indian reserve, and never was intended to apply to the Indian reserve; and the by-law must be considered as applying to the territory within the jrisdiction of the council: McLeod v. Attorney-General, [1901] A. C. 455, at p. 459.—"They were only legislating for those who were actually within their jurisdiction." See also Re Milloy and Township of Onondaga, 6 O. R. 573, 579; Re Metcalfe, 17 O. R. 357. It was argued that some of the voters might have thought that liquor selling was to be by this by-law prohibited in the reserve, and so voted for it. I decline to believe that any voter could be so simple and guileless.

4. The deputy returning officers were not selected before the by-law was published, and therefore, as their names were not mentioned in the by-law, it is invalid: Re McCartee and Township of Mulmur, 32 O. R. 69. This seems to be cured by 4 Edw. VII. ch. 22, sec. 8.

5. And it does not name a day, etc. This is also covered by the amendment just mentioned.

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6. The newspaper in which the notice is published is described as the "Brantford Courier," whereas, it is alleged, the real name is "The Courier." This objection, trivial as it is, proves, on the production of the paper itself, to be unfounded. While the display head is "The Courier," the sub-title is "Brantford Courier."

7. The voting was within less than three weeks after the first publication of the by-law. This is arrived at by applying sec. 203, which provides that for the purposes of secs. 137 to 201 Sundays and holidays shall be excluded; and by casting out Sundays and holidays, and dividing the remaining number of days by 7, the quotient is less than 3. But the statute does not say 3 times 7 days, but 3 weeks, and that period is well known. No doubt, the legislature might say that 3 weeks for the purpose of their legislation should be 21 days, excluding Sundays, etc., or 210 days or 2,100 days. But so far that has not been done, and still a week is from Sunday morning till Sunday morning or Monday morning to Monday morning.

8. Irregularities took place, it is said, in the meeting of the council. This objection is not open to the applicant: Re Van Dyke and Village of Grimsby, 7 O. W. R. 739, 8 O. W. R. 81; even if such irregularities existed in fact, which I am far from asserting or thinking.

9. While it is admitted that a scrutiny took place in fact, no notice is taken of any scrutiny upon the face of the by-law, and therefore it must, for the purpose of this motion, be considered that no scrutiny did take place; and, this being so, the date of the final passing of the Act was too late. It is admitted that if there had been no scrutiny the passing was too late, but it is contended that there is no necessity for the fact of a scrutiny appearing on the face of the by-law. I agree in that contention.

10. The council are not legally a council at all; they were not legally elected. This objection is disposed of adversely to this applicant in Rex ex rel. Armour v. Peddie, ante 393. I have read the Master's judgment, approve of it, and have nothing to add. And in any case this is not open to the applicant here: Re Van Dyke and Village of Grimsby, 7 O. W. R. 739, 8 O. W. R. 81.

11. The councillors did not take the proper declaration. This objection is also covered in the cases just cited.

The motion fails on all grounds, and must be dismissed with costs.

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BOYD, C. APRIL 26TH, 1907.

WEEKLY COURT.

RE STAINSBY.

Will—Construction—Vested Estate—Period of Distribution — Death of Legatee without Issue — Right of Surviving Husband—Devolution of Estates Act—Trustee—Power to Sell and Divide Estate.

Motion by surviving trustee under the will of William Stainsby for a summary order determining certain questions arising upon the will.

D. Urquhart, for the applicant.

B. N. Davis, for the widow of Joseph Stainsby.

Casey Wood, for the husband of Mary Ann Deacon.

M. C. Cameron, for the infants.

BOYD, C.:—The testator devises all his property, real and personal, to his wife for life, and after her death, and on the arrival of the youngest surviving child at the age of 21 years, the property is to be equally divided amongst all his children. In case of death of any child who shall be married and leave children, the share of that child shall be divided equally among his or her children.

The testator died in 1886; the youngest child came of age in 1903; and the widow died in 1907. All questions were disposed of at the argument except as to the one point, whether, in the case of a daughter, Mary, who died in 1900, leaving a husband but no children, she, Mary, had such a vested estate as gives her husband, in the right of his wife, an interest in the property now to be disposed of and divided.

The will provides for the division of the property upon the arrival of the youngest child at full age. This daughter Mary was not alive at that time (which was 1903). Her rights depend on the application of the terms of the will to that period, and it is immaterial that the actual distribution was postponed by the survival of the testator's widow till 1907.

Is Mary included in the term "all my children" in the clause reading: "On the arrival of the youngest surviving

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child at the age of 21 years it is my will that the property be disposed of and be divided equally amongst all my children?" The next clause reads: "In the case of the death of any one of my children who shall be married, his or her share shall belong to and be divided equally among his or her children," &c. This indicates that the testator regards a deceased married daughter as having "her share," though she is not alive at the period of distribution—which is at the death of the life tenant, the widow. Her share is to go to her children, and her surviving husband would of course have his one-third interest in such share. Should not the like consideration apply to the case of one who dies without children and leaving a husband, in which event the surviving husband would take half and her representatives the other half? This clause favours the view that the children who survive the testator, if they attain 21 years of age, take vested estates before the period of distribution.

So far as the estate dealt with in this will is of mixed realty and personalty, and so far as the bequest is in the form of a direction to make distribution at a future period, it is on all fours with Kirby v. Bangs, 27 A. R. 17 and 30. The point of distinction is that there the children were referred to nominatim; here as a class. That gives rise to a distinction, which, however, does not appear to affect this case. The provision to distribute when the youngest child attains 21 years indicates that the class to take is ascertained as the children reach respectively 21 years; at that point the shares become vested, but if any die short of that age, such a one does not come within the class to take, and the infant so dying receives no benefit. But, if the provision is to pay the children by name at a future period, then any one in existence at the death of the testator gets the benefit, though dying in infancy. That is the distinction marked by Cooper v. Cooper, 29 Beav. 229; Leeming v. Sherratt, 4 Ha. at p. 23. The result is neatly expressed in Theobald on Wills, 6th ed., p. 567 (10). The judgment in Baird v. Baird, 26 Gr. 367, is corrected and explained in Town v. Borden, 1 O. R. 327, as Mr. Wood pointed out in his excellent argument.

The conclusion then is that the sole trustee has power to sell and divide.

The husband of the deceased daughter Mary has one-half interest in her aliquot part, and the other half goes to her proper representatives.

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The widow of the deceased son Joseph has her proper interest in his share under the Devolution of Estates Act.

Costs out of estate.

CARTWRIGHT, MASTER. APRIL 27TH, 1907.

CHAMBERS.

LEWIS v. MOORE.

Venue—Place where Cause of Action Arose and Parties Reside—Rule 529 (b)—Libel—Letter—Place of Posting — Publication — Change of Venue — Preponderance of Convenience—Fair Trial.

Motion by defendant to change the venue from Woodstock to London, the action being for an alleged libel contained in a letter admittedly written and posted at London, where both plaintiff and defendant reside.

The motion was made on the ground that the action must be tried at London, as required by Rule 529 (b), and also on the ground of the preponderance of convenience.

W. E. Middleton, for defendant.

R. McKay, for plaintiff.

THE MASTER:—As to the first ground, it seems clear that the case comes under the Rule invoked. Rex v. Burdett, 4 B. & Ad. 95, decided that a delivery at the post office at any place of a sealed letter enclosing a libel is a publication of the libel at that place. The case is cited in Odgers on Libel and Slander, 4th ed., p. 155, as the governing authority.

On the second ground it is not necessary to decide if the case comes within the Rule relied on. It would seem, however, that this is eminently a case for trial at London: see per Osler, J.A., in McDonald v. Park, 2 O. W. R. 972. Defendant swears that he will require at least 10 witnesses all resident in London, 5 of whom are public officials . . . see Fogg v. Fogg, 12 P. R. at p. 251. Their evidence on the pleadings would seem to be material. The affidavit of plaintiff is vague as to witnesses, and he does not commit himself

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to any number. He says that political feeling runs so high that he cannot have a fair trial at London, as he and defendant are on opposite sides. The mere allegation of plaintiff as to this is not sufficient to justify a change from the proper place: see Roche v. Patrick, 5 R. R. 210; Blackburn v. Cameron, ib. 341, where the cases are all cited.

The order will therefore go; costs in cause to defendant.

RIDDELL, J. APRIL 27TH, 1907.

WEEKLY COURT.

RE CAVANAGH AND CANADA ATLANTIC R. W. CO.

Railway—Expropriation of Land—Compensation—Arbitration and Award — Appeal — Evidence on — Affidavit of Arbitrator — Barrister — Examination of Arbitrator — Questions of Fact—"As in a Case of Original Jurisdiction"—Value of Hotel Premises—Proximity to Railway Station — Quantum of Compensation — Disturbance of Possession—Loss of Profit—Goodwill—Liquor License—Chances of Failure to Renew — Interest on Amount Awarded — Computation from Date of Deposit in Registry Office of Order of Board of Railway Commissioners —Costs.

Appeal by the railway company and cross-appeal by James Cavanagh from an award of compensation for lands taken for the railway, under the Railway Act, 1903.

M. K. Cowan, K.C., for the railway company.

M. J. Gorman, K.C., for James Cavanagh.

RIDDELL, J.:—James Cavanagh is the owner of a rhomboidal piece of land in Ottawa. . . . The railway company, requiring the property, filed a plan on 18th May, 1906, shewing that they required the land. Before doing this, the railway company had, on 20th March, 1906, obtained an order of the Board of Railway Commissioners under sec. 139 of the Railway Act, 1903, authorizing them to take

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and acquire the land, which order was deposited in the proper registry office at Ottawa with the plan on 18th May, 1906. The deposit of the order was advertised in the Ottawa Free Press upon the same day. The parties not agreeing as to the price to be paid, arbitrators were chosen under the provisions of the Railway Act, the company selecting John Christie, the owner selecting F. R. Latchford, K.C., and John C. Featherstone being selected as the third arbitrator.

. . . .

A very considerable body of evidence was taken, and finally on 5th March, 1907, two of the arbitrators, Messrs. Latchford and Featherstone, signed and published an award whereby the owner was allowed $22,000 "as a proper compensation to the said James Cavanagh for the said land and for all damages by him sustained arising from the taking of the same by the Canada Atlantic Railway Company, or by the exercise of any of the powers granted to the said company by the said Acts." See R. S. C. 1906 ch. 37.

Thereupon both parties appealed under R. S. C. 1906 ch. 37, sec. 209. . . .

The first step taken by the railway company, even before serving notice of appeal, was to procure an affidavit from Mr. Christie shewing how the $22,000 was made up. Objection was taken to this affidavit being read before me, upon the ground that Mr. Christie is a barrister, and Russell on Awards, 12th ed., at pp. 510 and 680, was referred to. No doubt, members of the Bar should avoid making affidavits in matters in which they have been engaged professionally, and there is a well understood rule amongst the profession in that sense; but I do not find that even in England the rule is always insisted upon where the barrister is an arbitrator; and in Ontario, where the barrister is generally also a solicitor, the objection could not prevail; the solicitor is the most prolific source of affidavit-evidence; and I do not know that a barrister, who is also a solicitor, need fear when he is swearing in his capacity of solicitor the evil fate threatened the mediæval bishop who swore in his capacity of prince. I do not give effect to the objection.

Then, after service of notice of motion, Mr. Featherstone was examined before a special examiner as a witness on the motion then pending. Mr. Featherstone answered without hesitation, and seemed anxious to give the fullest information as to the grounds of the award. Objection was taken

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. . . also to the reading of this evidence. Following a decision of Meredith, J., in Re Montreal and Ottawa R. W. Co. and Ogilvie (1898), not reported on this point, though reported on a question of practice in 18 P. R. 120, in which I was of counsel for the railway company, and had examined two of the arbitrators—both barristers by the way—in the same way as Mr. Featherstone was examined here—I overruled the objection. In that case Meredith, J., held, upon objection being taken by Osler, Q.C., upon the principle that arbitrators could not be compelled to state the grounds of their judgment, that, however that might be, if arbitrators did state their grounds, there was no reason why such evidence should not be received. This was not a mere academic ruling, but the admission of the evidence resulted in a substantial reduction of the award.

Upon the appeal, therefore, I heard the evidence, the affidavit of Mr. Christie, and the evidence before the arbitrators.

It will be noticed that the statute R. S. C. 1906 ch. 37, sec. 209, which governs the appeal, provides that "upon the hearing of the appeal such Court shall decide any question of fact upon the evidence taken before the arbitrators, as in a case of original jurisdiction." Upon all questions of fact, therefore, I look only at the evidence before the arbitrators. And the meaning of the expression "as in a case of original jurisdiction" has been interpreted by the Court of final resort.

In Atlantic and North-West R. W. Co. v. Wood, [1895] A. C. 257, the Judicial Committee were called upon to interpret the same expression in the former Railway Act, 51 Vict. ch. 29, sec. 161 (2) (D.), and they say at p. 263: "It would be a strained and unreasonable reading of the words of the statute 'as in a case of original jurisdiction' to hold that the evidence was to be taken up and considered as if it had been adduced before the Court itself in the first instance and not before the arbitrators, and entirely to disregard the judgment of the arbitrators and the reasoning in support of it. Such a reading of the statute would really make the Court the arbitrator, and the sole arbitrator, in every arbitration in which an appeal on questions of fact was brought against an arbitrator's award. It appears to their Lordships that this was not the intention of the legislature, and that what was intended by the statute was not

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that the Court should thus entirely supersede and take the place of the arbitrators; but that they should examine into the justice of the award given by them on its merits, on the facts as well as the law."

I am the more glad in this instance that the rule has thus been laid down, as I am enabled to avail myself to the full of the local knowledge of the arbitrators.

The rule to be followed by a court of appeal in "a case of original jurisdiction" is laid down in Coghlan v. Cumberland, [1898] 1 Ch. 704, at pp. 704, 705: "Where . . . the appeal turns on a question of fact, the Court of Appeal has to bear in mind that its duty is to rehear the case, and the Court must reconsider the materials before the Judge, with such other materials as it may have decided to admit. The Court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it: and not shrinking from overruling it if, on full consideration, the Court comes to the conclusion that the judgment is wrong."

With these principles so authoritatively laid down, I approach the consideration of the evidence.

The property in question was used by Cavanagh as a hotel, and it is fairly clear from the evidence that the hotel depended for its success upon the bar; that the bar was very profitable, but solely so because of its proximity to the station of the railway company, rendering it easy for patrons of the railway to go into the hotel for refreshments, either passing to or from the station, or when waiting at the station. Admittedly the railway company might lawfully close out all access to and from the grounds so as to deprive the owner of this very lucrative custom. It appears from the affidavit of Mr. Christie and the examination of Mr. Featherstone that the two arbitrators who signed the award, or at least Mr. Featherstone, gave the $22,000 on the following basis:—

For the land	$ 9,000
For the buildings	8,000
And for removal, loss, including goodwill, and inconvenience and other damage sustained	5,000
In all	$22,000

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. . . Counsel for the company attacked each and all of these amounts, but especially the $5,000. I have read all the evidence adduced by both parties, and think that the sum awarded for the land and that for the buildings are not excessive. It is true that much evidence was given shewing that land in the immediate vicinity was much of it bought at a much smaller figure, and that some was unproductive property, but, taking the evidence as a whole, I am satisfied that the two arbitrators have arrived at a fair estimate; and it must not be forgotten that full recompense should be made to the owner in proceedings of this character. Taking the land (4,365 square feet) the witnesses for the company place this at these sums:—

Donald	$5,000
Wallace	6,000
Coté	6,000
Macfarlane	7,000
	$24,000

Or an average of $6,000.

Witnesses for the owner place the amount very much higher, the owner himself as high as $13,500, and others $12,000, and smaller sums down to $10,000. I do not think $9,000 is too much, even taking into consideration the argument of Mr. Cowan which I shall speak of later on.

Then, as regards the buildings, the company's witnesses say:—

Donald	$6,000
Wallace	7,500
Coté	8,000
Macfarlane	8,000
	$29,500
An average of	$7,375

Witnesses for the owner place this all the way from $8,000 to $10,000; and I think $8,000 is not an extreme figure.

The third item of damage is, perhaps, not so easy to estimate. It was argued for the railway company, upon this branch chiefly, though also upon the other branches, that

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all the trade (in effect) of value to the premises and which made the premises valuable, was due to the proximity of the railway company's station and the convenience of access to and from the station. I think that that is true to a very great extent indeed. Then it is argued that the railway company might lawfully fence off the hotel premises and the street running by, and so deprive the hotel of practically all its valuable custom, and this without rendering the company liable for damages. This is, I think, also true. Then it is said, since the railway company could, if they pleased, render the property valueless, at least as a hotel, nothing should be allowed against the railway company, when, instead of doing so, they are taking away the land itself. . . .

[Reference to Caledonian R. W. Co. v. Walker's Trustees, 7 App. Cas. 259 (H. L. Sc.)]

That case would be authority (if any were needed) for the proposition that if the company were to fence off the hotel property, no compensation could be awarded. But that is not what is being done. The company are taking away from the owner property to which they have no right without the assistance of the statute; and, while, no doubt, they might destroy in large measure the value of the property, at least as a hotel, without any right of action, no one in his senses would expect them to do anything of the kind in the usual course of business.

In all the circumstances of the case, I think it is reasonable to believe, and I do believe, that unless and until the company should want to acquire the property no interference was to be anticipated, though such interference was within the legal right of the company. Railway companies are no more likely than natural persons . . . "to bite off their nose to spite their face." It might indeed well be that a company might threaten so to act or in reality so act with a view to compelling a sale of the property at a low valuation; but I do not see that, except with this in view, anything of the kind was ever to be anticipated.

The arbitrators, then, were right in allowing a sum for disturbance of business and loss of profit reasonably to be anticipated.

Then it is argued that the business could not be a success without a liquor license, that there was no certainty of the renewal of the liquor license, and in any case such a

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renewal is a personal right, and therefore nothing should be allowed for the loss of a business which depends upon such a chance. . . .

[Lynch v. Corporation of Glasgow, 5 Ct. of Sess. Cas., 5th series, 1174, referred to.]

Our statute is much more general than the Act under which the expropriation took place in the Lynch case, and I think is quite broad enough to entitle the owner here to a reasonable sum, taking into account the chances of a renewal of his liquor license. It is common knowledge that if a license-holder conduct himself properly, he need have little fear that his license will not be renewed. A liquor license, too, is not a mere personal right; the license is attached to the property quite as much as to the person, if not more so. . . .

[Reference to Ex p. Farlow, 2 B. & Ad. 341.]

I am of opinion that the probability of the owner or the hotel losing a license, while it should be taken into account in fixing the value of the goodwill and damages for being ousted from the premises, is after all but a small one. I think the sum allowed by the arbitrators for this, viz., $5,000, is not too large. The appeal, then, of the company must be dismissed with costs.

The owner cross-appealed, claiming an increase of the award, and also interest from the date of filing the plan.

While much of the evidence would warrant an increase in the amount awarded, I do not, taking all the evidence together, think it proper to increase the award.

As to interest, the value of the land, etc., was fixed with reference to the date of filing the plan, and rightly so in this case. The order of the Board being deposited, it was practically impossible for the owner to do anything with his land except hold it for the company.

James v. Ontario and Quebec R. W. Co., 12 O. R. 624, decides that interest is properly allowed to the land-owner on the amount of his compensation from the time of taking, i.e., I think, from the time the land-owner knew that he had to give up his land, to the time of the award. It was argued that the railway company were not chargeable with

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interest at all. It seems to me a monstrous proposition to say that a railway company may tie up a man's land, prevent him from obtaining any advantage from a rise in value, have the land valued at their leisure months afterwards, and then get off with the principal. I find no authority so deciding, and I shall make none. Being the Court of final resort, I presume that I am not bound by the authority of the James case. Even if not, I follow it as to the interest being allowed from the time I have mentioned. But it is said that the James case also decides that interest is not recoverable for the period when the company could not lawfully have had possession: see 12 O. R. at p. 631; that the company could not lawfully have had possession because they were not ready to proceed with the work for which this property was needed; that they applied to the Judge of the County Court of Carleton for an order for possession, and this application was refused, the owner opposing the granting of such an order. This makes the case, if possible, more clear against the company. Instead of waiting until they really wanted and were ready to utilize the property, they get an order from the Board for the land and deposit this order in the registry office, thereby tying up the property. They do not hasten their preparations for the work, but without being ready to proceed try to obtain possession without paying the full value of the property, and then, upon failing in this, proceed at their leisure to have the price fixed. This is not a case in which "the company could not lawfully have had possession;" it is a case in which the company obtained an order for the land before they really were ready for and needed it.

The appeal of the owner will be allowed to the extent of allowing interest upon the compensation from the date of filing the order; otherwise it will be dismissed.

I cannot help but think that the substance of the appeal of the owner was really the interest claimed, and the appeal, so far as it related to the amount of the award, a mere make-weight.

The owner will have the costs of his appeal except so far as the same have been increased by the appeal on the ques-

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tion of amount of award; he will pay to the company the amount, if any, by which their costs are increased by the appeal as to quantum.

On the question of interest the following may be looked at: Re Birely and Toronto, Hamilton, and Buffalo R. W. Co., 28 O. R. 468, 25 A. R. 88; In re Leak and City of Toronto, 26 A. R. 351, 30 S. C. R. 321; In re Macpherson and City of Toronto, 26 O. R. 567.

BOYD, C. APRIL 27TH, 1907.

WEEKLY COURT.

RE PETERBOROUGH COLD STORAGE CO.

Company — Directors — Transfer of Shares before First Payment Made—Breach of Duty by Directors—Ontario Companies Act—Inquiry into Standing and Solvency of Transferees — Winding-up — Liability of Directors to Make Good Amounts not Recovered from Transferees as Contributories.

Appeal by liquidator from order of local Master at Peterborough refusing to place the names of directors of the company upon the list of contributories in respect of shares transferred to other persons before payment of first deposit on shares.

R. E. Wood, Peterborough, and W. E. Middleton, for the liquidator.

D. O'Connell, Peterborough, for the directors.

BOYD, C.:—The letters patent for this company issued on 13th November, 1903, incorporating the original subscribers to the memorandum of agreement and such others as should become subscribers for stock therein. Subsequent stock was applied for and obtained by other shareholders upon the terms of paying a deposit of 25 per cent. of the par value of the stock, and an agreement to pay a further sum

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of 25 per cent. upon allotment. This was in effect a down payment of 25 per cent. on stock at the time of subscription, and it imports a like liability to be undertaken by the original shareholders at least when the charter was issued. But the original corporators avoided making such payment of 25 per cent., and took steps to get rid of the bulk of their stock by transferring it to persons of little or no substance, not a great while before the company's insolvency. Middleton, a director, one of the chief actors in the affairs of the company, puts it graphically thus: "The matter was growing worse and worse and we thought it better to get out of it." This transfer of stock by the directors en bloc is impeached upon this appeal.

I think the position taken by the appellant is well founded, viz., that the directors were incapacitated from making the transfers while yet the 25 per cent.—representing the first payment on the shares—was an outstanding liability. The transaction is within the mischief guarded against by sec. 30 of the Act R. S. O. 1897 ch. 191. That enacts that "no share shall be transferable till all previous calls thereon have been fully paid." Technically there was no call made, but there was 25 per cent. exacted from the subsequent subscribers for shares by the directorate—and they excused themselves from making a like contribution to the funds of the company. True it is that little money was paid by the subsequent subscribers, because few had it available, but their promissory notes were taken as an earnest of payment. Nothing, however, was given by the directors in respect of this first payment of 25 per cent., and they thereby discriminated against the subsequent shareholders and in favour of themselves in a manner contrary to the legitimate method of assessing unpaid stock. Such stock should be got in or called in or assessed so that an equal burden fall upon all the shareholders. The directors abused their position in calling upon the new comers and passing by themselves: Alexander v. Automatic Telephone Co., [1900] 2 Ch. 56. Upon the issue of the letters patent they became liable without more to pay for the stock subscribed for by them: Re Haggert Bros. Manufacturing Co., 19 A. R. 582; the time when it should be called in was in their hands, but they indicated that time when they exacted the 25 per cent. upon the subscription by the new shareholders. The shares of the directors were held in the same way and

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upon the same footing as those upon which 25 per cent. was got in, and I think the fair reading of the statute places these directors in the list of shareholders who were in default when they assumed to make the transfers and unload their own burden upon impecunious people. This ground would justify the success of the appeal.

But, again, the directors, in the consideration of applications for the transfer of shares under sec. 28, are in a fiduciary position, and are called upon to act with due regard to the interests of the company. They are given discretionary powers to guard against transfers being made of stock not paid in full to persons of apparently insufficient means. Here the directors were all in the same boat, making transfers of their own stock for their own benefit, or rather for their own relief, in view of impending complications, and, apart from the question of their being disqualified absolutely, it was incumbent upon them to exercise special care and precaution in procuring responsible transferees. Reading the evidence and regarding all the circumstances and the absolute impossibility of making anything out of their transferees, I think the conclusion is most persuasive—nay, irresistible—that they acted to the manifest detriment of the company and with the sole view to protect themselves as shareholders, contrary to their duty to guard against improper and illusory transfers.

The manner of acting was unique. The directors knew their position, that, according to the statute, it was necessary for them to get rid of liability for the 25 per cent. before they could make valid transfers. They accordingly employed Mr. Geo. Carton, the promoter of the company, to procure persons who should take over their stock and clear the preliminary payment required. He had no difficulty in procuring 5 persons who were willing to take over all the directors' stock (except one share reserved for each director) on representations made to these persons that if they gave promissory notes for enough to pay the 25 per cent., without interest, at 6 months, they should become directors, and, as to 4 at least out of the 5, that they would not be required to pay a cent, as Mr. Carton would provide for the disposal of their stock afterwards.

These notes were made payable to the company by the 5, and were handed over (apparently in breach of the under-

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standing) before the transfers of stock were made to them by the directors. This was apparently in pursuance of an arrangement between Carton and the directors by which the notes were to be regarded as the payment by the directors of the 25 per cent. This was an ingenious device to get round the statute, but the lack of reality is shewn in the fact that the notes were not made payable to the directors and indorsed by them to the company—that the directors evaded making themselves liable—that money could not be procured from the transferees — and so, by this kind of shuffle, the directors evaded any personal liability and put forward men to take their place who could not make the down payment. In other words, the directors cleared themselves at the expense of the company. Had they given their own notes or taken notes from the transferees and indorsed them to the company, their position would be essentially different. Carton seems to have taken no pains to ascertain the financial standing of the men he dealt with. I should say he knew they were unsubstantial quoad the burden to be assumed, and abstained from inquiry.

Carton found the persons who were to be the transferees; he did not divide the amount to be taken, as originally contemplated by letter of 23rd August, 1904, but he says: "I gave $6,750 to Wilson because I looked on him as better able to carry it. Some of the other men were not in a position to take $4,000, and I got Wilson and Cochrane to take the overplus."

The other names are Whiton, Hanna, and Bell.

Two of the directors, Mr. Carton (brother of George) and Middleton, were appointed as a committee of directors to inquire as to Cochrane and Wilson. What they did was to go to Mr. Campbell, manager of the bank at Peterborough, and get him to telegraph to the manager of the bank at Port Hope, Mr. Lamprey. Mr. Lamprey recalls being asked about two names (which he cannot give), and he made inquiry of Mr. Chalk, carriage maker of Port Hope. Chalk says he was asked as to Wilson, Cochrane, and Ballagh, but that he did not know anything about them at all. Mr. Lamprey says he made no other inquiries than from Chalk, and he was told the two men he asked about were in good standing, but nothing was said about how much they were good for.

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Mr. Campbell says inquiry was made by Carton and Middleton as to Wilson, Cochrane, and Ballagh, and he ascertained from Lamprey that he knew Wilson and he would find out as to Ballagh and Cochrane. In the result he could find out nothing about Cochrane, but that Ballagh and Wilson were good men, but can't say if any amount was mentioned. It appears that the dealing with Whiton was not carried out; he gave a note, but it was returned to him, and Ballagh was nominated to take his place. So that I leave out any consideration of Whiton's standing. The directors appear to have had no evidence or information as to the standing of Cochrane, but it is in evidence that he had no cash to pay the note at the time, nor is he now able.

As to Wilson, he had in fact no property to pay for the stock transferred; he was then and still is in debt. He had a cheese factory mortgaged, in which he values his equity at $400; he rents a farm and gets an occasional credit for $1,000 in the bank on the credit of shipments of cattle, when he does a little business as drover. Such is the man who is made responsible for $6,750.

As to the others, Bell is a street car conductor, who has nothing and had nothing at the time. His wife had some property 5 years ago, but that was gone when his note was given.

Ballagh's reputation in the neighbourhood was that he was not able to pay; he was examined and said he never could pay; his mother had a farm which he worked, and so was spoken of as a farmer.

Hanna's wife had a house in Charlotte street, but he had no property when the note was given. The only means of payment, and this he made known to the directorate, was his claim to be paid some commission for selling stock of the company, which he estimated at about $400 or $500. This, however, was only to be paid when the cash was actually received on the 25 per cent. subscribed for by the shareholders subsequent to the patent, and is altogether a remote and at present a vanishing quantity. . . .

To my mind, the inquiries made were of a highly perfunctory character. The directors were acting with the admonition of the statute in view, but, as Mr. Middleton says

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broadly, while they made all the inquiries that the statute required, it did not require that they should find out to a cent. If they were satisfied with what was the result of their information and inquiries, the satisfaction was, I think, prompted more by the exigency of their position than by their desire to protect the company. . . . Their duty conflicted with their interest, and some more cogent evidence would be needed to enable one to see that the statute had been complied with and not evaded.

The proper rule of law is that a director is so far in a fiduciary position towards the company that he cannot exercise or refuse to exercise the powers vested in him as director against the interest of the company, and that he must exercise his powers for the general interests of the company: per Cotton, L.J., in In re Cawley, 42 Ch. D. 233.

The intent of sec. 28 may be expressed by adopting the language used by Turner, L.J., in Bennett's Case, 5 De G. M. & G. 299, viz., that the directors of the company should be placed in a position which would enable them upon each proposed transfer to secure to the company a solvent and responsible transferee.

The directors kept from the knowledge of the shareholders the fact that the shares held by the directors were treated, so far as the preliminary payment went, on a different footing from the shares subscribed after the patent; they kept from the knowledge of the shareholders the fact that they had disposed of all their shares except one, which they retained for the purpose of carrying out the transfers and changing the directorate. They acted throughout with the knowledge, either direct or through the agency of George Carton, that the transfers were not of sufficient substance to pay in cash for the shares transferred, nor for the second payment of 25 per cent. which was to be made upon the allotment of stock—that being allotted on 6th July, 1904—although the payment was postponed till the directors accomplished the transfer of their stock.

I do not think that the transaction can be upheld. There was a violation of duty on the part of the directors—a breach of trust—which renders them liable to make good,

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as damages, any sums which in the winding-up may be required and which cannot be made good by the ostensible transferees, who are to be called upon in the first instance.

The appellant is to be paid by the respondents his costs of this appeal.

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THE

ONTARIO WEEKLY REPORTER

(To and Including May 4th, 1907).

VOL. IX. TORONTO, MAY 9, 1907. No. 17

WIDDIFIELD, JUN. CO.C.J. APRIL 29TH, 1907.

EIGHTH DIVISION COURT, GREY.

FEDERAL LIFE ASSURANCE CO. v. HEWITT.

Infant—Promissory Note Given for First Premium for Insurance on Infant's Life—Action by Insurance Company—Ontario Insurance Act, sec. 150, sub-sec. 6.

Action on a promissory note.

I. W. McArdle, Markdale, for plaintiffs.

P. McCullough, Markdale, for defendant.

WIDDIFIELD, JUN. CO. C.J.:—Action on a promissory note given by the defendant to the plaintiff for the first premium on a policy of life insurance on his own life. The defendant pleads infancy. The plaintiffs contend that, notwithstanding the defendant's infancy, he is liable by virtue of sub-sec. 6 of sec. 150 of the Ontario Insurance Act. That section provides that where a person between the ages of 15 and 21 insures his own life "the assured shall not by reason of his minority, be deemed incompetent to contract for such insurance or for the surrender of such insurance, or to give a valid discharge for any benefit accruing, or for money payable under the contract."

I do not think this sub-section assists the plaintiffs suing on a promissory note as in this case. It has been held in a long series of cases that an infant cannot make himself liable by the custom of merchants either by a bill of exchange or by a promissory note. Whether the above sub-section would enable the plaintiffs to recover on the original contract is another question. The cases are collected in Re

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Soltykoff, Ex p. Margrett, [1891] 1 Q. B. 413, where Lord Esher, M.R., says: "The principle of the cases goes to this extent, that, if an infant accepted a bill of exchange or gave a promissory note for the price of necessaries supplied to him, and he were sued upon the bill or the note by the man who had supplied the necessaries, and the plaintiff relied only on the bill or note, and gave no evidence of the supply of the necessaries, the infant would not be liable. He is not liable upon a bill of exchange or a promissory note under any circumstances."

Here the plaintiffs are in no better position, under the provision of the Ontario Insurance Act relied on by them, than they would be if suing on a promissory note given for necessaries. In both cases the incompetency to contract is removed; and if the plaintiffs could not recover in the former case they cannot recover here. The reasoning which enables a plaintiff to recover against an infant on a contract for necessaries supplied to the infant, but which prevents him recovering on a promissory note given for the necessaries, appears to be wholly artificial, and in the Soltykoff case above cited the Court of Appeal was urged to overrule the previous cases, but the Master of the Rolls said: "It would be absolutely wrong at the present day to overrule those cases which have been so long accepted as law."

The action must be dismissed with costs.

RIDDELL, J. APRIL 29TH, 1907.

WEEKLY COURT.

RE MOIR.

Will—Construction—Residuary Bequest to Children—Death of One Child before Testator—Child Specially Named—Wills Act—Children Taking Parent's Share — Rule Not Applicable to Members of Class.

Motion by executors for order determining questions arising upon the will of James Moir, deceased.

F. W. Gladman, Exeter, for executors.

A. R. Hassard, for representatives of Margaret Nairn, deceased.

C. A. Moss, for surviving children of James Moir, deceased.

F. W. Harcourt, for infants.

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RIDDELL, J.:—James Moir made his will 25th May, 1903, wherein, after sundry devises, he says: "All residue of my estate . . . I give in equal shares to all my children except J., as she has already had more than the others. Her share or a double share shall go to M."

At the time of the making of the will, his children, 8 in number, were all alive; thereafter, before his own death, his daughter M. died, leaving issue. All the rest of his children survived him when he died in January, 1906.

The question is, what is to become of the share of the daughter M.?

At the common law, the children of M. could take nothing. After the passing of the Wills Act in England (1 Vict. ch. 26), many attempts were made to have it declared that sec. 33 of that Act, which is the same as our sec. 36, R. S. O. 1897 ch. 128, covered such a case as the present, but it has been thoroughly established, notwithstanding the adverse comments of some text-writers and others, that in the case of gifts to a class, as tenants in common, the snares of members of the class dying before the testator do not pass to the issue of those dying, but go to the other members of the class. From Olney v. Bates, 3 Drew. 319, Brown v. Hammond, Johns. V. Ch. Cas. 210, and Stewart v. Jones, 3 DeG. & J. 532, onward, that rule has been followed, and it is too late to question it. And the fact that M. is named specially makes no difference: Re Stanhope's Trusts, 27 Beav. 201; Shaw v. McMahon, 2 Con. & L. 528; In re Featherstone's Trusts, 22 Ch. D. 111.

The general principle is discussed in our Courts in Re Williams, 5 O. L. R. 345, 2 O. W. R. 47, and In re Clark, 8 O. L. R. 599, 4 O. W. R. 414. I have not found any Ontario case in which any member of the class has been specially named; but I am bound by the decisions in the English Courts.

The statement of the law found in 18 Am. & Eng. Encyc. of Law, 2nd ed., p. 757, is misleading, the editor saying: "In England . . the statute has been held not to apply to a gift to a class, none of whom are mentioned by name." And it would be drawing too fine a distinction to consider that the fact that M. was to get a double share should make any difference.

The share that otherwise had gone to M. falls now to the other children, and the six will share the residue equally.

Costs of all parties out of the residue.

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APRIL 29TH, 1907.

DIVISIONAL COURT.

ST. CATHARINES AND NIAGARA POWER AND FUEL CO. v. THOROLD NATURAL GAS CO.

Contract—Construction—Supply of Natural Gas—Covenant Restricting Supply to Others than Plaintiffs—Breach—Exceptions—Supply to Consumers' Company.

Appeal by plaintiffs from judgment of TEETZEL, J., ante 86.

W. Nesbitt, K.C., for plaintiffs.

W. H. Blake, K.C., for defendants the Niagara Peninsula Power and Gas Co.

C. A. Moss, for the other defendants.

The judgment of the Court (FALCONBRIDGE, C.J., BRITTON, J., CLUTE, J.), was delivered by

CLUTE, J.:—This appeal depends upon the construction to be placed upon the agreement of 24th September, 1904, entered into between the Niagara Peninsula Power and Gas Company (hereafter referred to as the Niagara Co.), the St. Catharines and Niagara Power and Fuel Company (hereafter called the St. Catharines Co.), and certain individuals, and the Toronto General Trusts Corporation.

The Niagara Co. developed a natural gas field in Welland, and proposed to bring the gas from the field for the purpose of supplying St. Catharines, Thorold, Merritton, and Port Dalhousie. The St. Catharines Co. obtained a franchise from the city of St. Catharines for laying of pipe lines along the streets of that city for the conduct and distribution of natural gas. The Niagara Co. agreed with the St. Catharines Co. to supply them with natural gas and for such purpose to lay pipes within a mile of St. Catharines. The St. Catharines Co. agreed to take the supply of gas from such point and distribute the same throughout St. Catharines, Merritton, and Port Dalhousie. There are many other items of the agreement, but the following terms are sufficient for a disposition of this appeal. Plaintiffs agreed to take from the Niagara Co. "all the gas the Niagara Co. can

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from time to time supply and the consumers of the St. Catharines Co. use for a period of 8 years," upon the terms therein mentioned, and the Niagara Co. agree that they will supply "all the natural gas which they now have or which they hereafter get under their control, except such as they require for supplying demand for domestic heating and cooking purposes only in the town of Thorold, and no other towns or village, and for use in lighting the Welland canal, and for domestic use of the consumers at the gas fields and along the line of the pipe line," etc.

The Niagara Co. further covenanted that they would not "during the term of this agreement supply any consumer in the city of St. Catharines or the village of Merritton or Port Dalhousie, except as aforesaid, for lighting of Welland canal, nor will it dispose of any gas to any other company or persons for the purpose of supplying such places or any other places or consumers except Thorold."

A company was formed, the Thorold Natural Gas Co. of Toronto, for receiving from the Niagara Co. natural gas and distributing the same in Thorold. Plaintiffs now complain that this is a breach of the covenant, and that, under the terms of the agreement, the defendants the Niagara Co. were alone permitted to distribute the gas in Thorold—that in the said covenant "it" refers to the Niagara Co., and does not include any company that might be formed for distribution of the natural gas in Thorold.

On the argument I was somewhat impressed with this view, but on a further careful reading of the contract, I think it is quite clear that this was not the intention of the parties. The St. Catharines Co. was formed for distributing and supplying natural gas to the consumers of St. Catharines, and I think it may fairly be inferred that the defendants the Niagara Co. intended to provide for the distribution of gas in Thorold in the same way. At all events, if the document does not expressly provide for it, it does not exclude the formation of a company for that purpose.

It was urged that the company thus formed for distribution would be more vigorous in extending its operations than would the original supply company, but that is pure assumption. The recital clearly indicates that Thorold was to be supplied with gas, and that would fairly mean that it was the intention to supply Thorold with all the gas that its consumers would require to use. If the supply was sufficient, it would be a benefit rather than an injury to all parties.

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The only argument in the present case is based upon the fact that the supply seems to be deficient for both places. But, so far as one can infer from the document, if that was contemplated, it also was provided for by the clause which enabled the St. Catharines Co. to obtain gas for its supply in case of shortage or from other sources.

I agree in the judgment of Teetzel, J. . . .

Appeal dismissed with costs.

APRIL 29TH, 1907.

DIVISIONAL COURT.

CARPENTER v. CARPENTER.

Covenant—Restraint of Trade—Partnership — Dissolution — Agreement of Defendant not to Carry on Business, Provided Plaintiff Continues in Business—Transfer of Plaintiff's Business to Incorporated Company—Plaintiff Managing and Interested in Business.

Appeal by plaintiff from judgment of CLUTE, J., at the trial at Hamilton, dismissing the action, which was brought to restrain defendant from carrying on the business of buying and selling fruit, in breach of a covenant entered into by defendant upon dissolving partnership with plaintiff. Plaintiff and defendant were in business with their father under the name of C. P. Carpenter & Sons, both as fruit dealers and nurserymen. On 15th February, 1904, the partnership was dissolved, plaintiff (Thomas Carpenter) taking over the fruit business, and defendant (Frank) the nursery business. The covenant of defendant was not to carry on a fruit business, provided plaintiff continued in the fruit business. Plaintiff sold out his business to a company, of which he became assistant manager. He took the position that he or the company (his assigns) was carrying on business within the meaning of the proviso during the time that the company did business. The company failed, and plaintiff resumed business for himself.

S. F. Washington, K.C., for plaintiff.

G. Lynch-Staunton, K.C., for defendant.

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The judgment of the Court (BOYD, C., MAGEE, J., MABEE, J.), was delivered by

BOYD, C.:—The sole question here arises upon the construction of the agreement entered into upon the dissolution of the carpenter partnership of date 15th February, 1904, The neat point is, whether plaintiff has a status to maintain this action and claim the benefit of a covenant in restraint of trade made for his benefit by the other partner, his brother, the defendant. Plaintiff was to get the benefit of that covenant for 10 years. The covenants were mutual on the dissolution of the partnership. One branch, the nursery business, was taken over by defendant, and the other brother, the plaintiff, who took for his share the fruit part of the business, agreed that he would not engage in the business of growing, selling, or dealing in nursery stock for 10 years, "provided the defendant continues for such time to carry on the nursery business." The correlative covenant by defendant was that he would not compete with his brother in the fruit business, provided that the plaintiff should "continue for such time to carry on the fruit business." I read that as a personal engagement for 10 years by defendant that he would not interfere with the fruit business of plaintiff, provided that plaintiff should always during that time continuously carry on as proprietor that business. A continuous course of business in his own name as proprietor is the meaning which seems to be embedded in the language used.

It is relied upon for defendant that this stipulation has been broken by plaintiff in that he ceased to carry on the fruit business by entering into an incorporated company and transferring to that body his plant and property and goodwill in the business of which he was up to the date of transfer the sole proprietor. I think this is a sound position in law, having regard to the terms of the stipulation. The new company, the Distributors Company Limited, was formed by the combination of a number of individual fruit buyers, who contributed their individual assets to form the corporate property, and received in return certain payments of money and certain allotments of paid-up stock. The company went into active operation, and so continued for 2 or 3 years till it became financially embarrassed and was ordered to be wound up. After that cessation of corporate business,

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plaintiff resumed business as an individual and went on as before the incorporation.

As to cases, I would just refer to Ex p. Smith, 2 Pugs. (N.B.) 149, where it is laid down by Ritchie, C.J., that to carry on business implies that he who does so is the owner of the business and receiving its proceeds, and excludes one who is only an agent or manager; and to Garbutt v. Durham Joint Committee, in its various stages, [1904] 1 K. B. 522, [1904] 2 K. B. 474, and [1906] A. C. 291, as shewing that "continue" means an uninterrupted course of business or conduct.

Now, it seems to me plain that when plaintiff gave up his own business and transferred it to the incorporated company, he ceased to be a principal proprietor, and became only an agent of the new company, whether as director or president. The original individual business of fruit dealing did not continue into the incorporation, but ceased to exist. The arguments and judgment of Mansfield, C.J., in Dance v. Girdler, 1 B. & P. N. R. 34, contrasting the position of a voluntary association with an incorporated body composed of the same individuals, appears to me to illustrate the change which came over the fruit business, managed and controlled by the plaintiff as its owner and proprietor, when it was merged and disappeared in the assets of the Distributors Company Limited.

I cannot follow the line of argument that this business remained as a continued entity all through the life of the incorporation, and that it re-emerged as a going concern upon and after the winding-up order. Though plaintiff may not have received the whole of the cash that he was to get from the company, he received a substantial part, and thereafter acted all along as a member and an active member of the new body. It does not lie in his mouth to say that in his conduct of the business at Winona, as a branch of the Distributors Company, he was still acting as individual proprietor of the business that was in existence when he and his brother separated and took up the divided parts of the old partnership business.

I would affirm the judgment of my brother Clute, and with costs.

Since writing the foregoing opinion I have come across a case singularly parallel in its circumstances to the present. It is the decision of Mr. Justice North in Re Sax, Barned v. Sax, reported in 62 L. J. Ch. 688, 68 L. T. N. S. 849, 41

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W. R. 584, and 3 R. 638—a will case in which it was held that a condition of forfeiture if the legatees (sons) cease to carry on the testator's (father's) business, takes effect if they sell it to a company, although they become managing directors, and in substance sole shareholders of the company. Mr. Justice North said at the close of his judgment that the sons ceased to carry on the business when they transferred it to the company for the purpose of its being carried on by the company. This authority goes beyond what is needed to affirm the case in appeal.

APRIL 29TH, 1907.

DIVISIONAL COURT.

TROY v. HAMILTON.

Partnership—Declaration of—Dissolution—Asset of Partnership—Lease of Land taken in Name of Defendant—Assignment of Lease as Security—Redemption—Reference—Costs.

Appeals by defendants from judgment of BRITTON, J., ante 341.

S. H. Bradford, for defendant Hamilton.

J. H. Moss, for defendants Lawyer and Norris.

J. A. Macintosh, for plaintiff.

THE COURT (BOYD, C., TEETZEL, J., MAGEE, J.), dismissed the appeal of defendant Hamilton with costs, and the appeal of defendants Lawyer and Norris without costs.

APRIL 29TH, 1907.

C.A.

RE CITY OF NIAGARA FALLS AND NIAGARA FALLS SUSPENSION BRIDGE CO.

Appeal to Court of Appeal—Appeal from Decision of Ontario Railway and Municipal Board—Leave to Appeal—Questions of Fact—Certificate of Board.

Application by the city corporation for leave to appeal to the Court of Appeal, pursuant to sec. 76 of the Assess-

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ment Act, 4 Edw. VII. ch. 23, amended by 6 Edw. VII. ch. 31, sec. 51, from a decision or order of the Ontario Railway and Municipal Board reducing the company's assessment from $175,000 to $135,000.

C. A. Masten, for appellants.

C. A. Moss, for respondents, was not called upon.

THE COURT (MOSS, C.J.O., OSLER, GARROW, MACLAREN, MEREDITH, JJ.A.), dismissed the application, remarking that the appeal appeared to be upon questions of fact rather than of law, and that it was desirable in appeals of this nature that if the Railway and Municipal Board had passed upon questions of law, they should so state in their reasons for judgment, or should otherwise so certify to the Court of Appeal.

HOLMESTED, OFFICIAL REFEREE. APRIL 30TH, 1907.

CHAMBERS.

MARTIN v. JONES.

Pleading—Statement of Claim—Non-conformity with Indorsement on Writ of Summons—Particulars—Amendment—Costs.

Motion by defendants to strike out part of the statement of claim or for particulars.

The motion was heard by the Senior Registrar of the High Court, sitting in the place of the Master in Chambers.

N. G. Heyd, for defendants.

W. J. Clark, for plaintiff.

MR. HOLMESTED:—Assuming that no amendment had been made in the statement of claim, I am inclined to think defendants would have been entitled to the particulars claimed, and that the rest of the motion should have been refused; and in this view of the matter the costs of the motion, so far as it related to particulars, would have been costs in the cause to the defendants; but as to the other branch of the motion they should pay costs; that being so,

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the proper result would probably have been reached by making no order as to costs.

Pending the motion the statement of claim has been amended, and it is admitted that there is no longer any necessity for particulars, but I do not think that should make any difference in the result as to costs.

On the hearing of the motion I came to the conclusion that the statement of claim, though it varies from the indorsement on the writ of summons, does so only in the mode of stating the plaintiff's claim to recover the $500. The $500 is the substantial feature of the action; that is what plaintiff claims to recover, both by the writ and the amended statement of claim. The grounds on which he bases his claim to recovery are varied: the indorsement on the writ alleged an illegal ground, viz., that the money was advanced to bribe certain public officials, and that the defendants undertook, in consideration of the $500, to get a license continued to plaintiff. The amended statement of claim leaves out any allegation of bribery, but still alleges that defendants undertook, in consideration of the $500, to procure the transfer, and informed plaintiff that they had procured it subject to the payment of the $500 to defendants, which plaintiff paid, but the transfer was not in fact procured. The amended statement of claim, as it stands, is not, any more than the original statement of claim, in my opinion, a wider alteration from the claim indorsed on the writ than, under Rule 224, the plaintiff is entitled to make.

The motion is refused, and I make no order as to costs.

CARTWRIGHT, MASTER. APRIL 30TH, 1907.

CHAMBERS.

HODGSON v. BIBLE.

Particulars—Statement of Claim—Seduction—Times and Places—Death of Plaintiff's Daughter.

The facts are given in the previous report, ante 264.

The defendant renewed his motion for particulars after examination for discovery.

T. J. W. O'Connor, for defendant.

C. A. Moss, for plaintiff.

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THE MASTER:—The examination of defendant for discovery has not elicited anything which will enable plaintiff to give any more definite particulars than those already given. To order particulars would, therefore, be useless, and would have the effect of dismissing the action.

The facts of this case, so far as I can discover, are unique. The plaintiff may perhaps be relying on admissions by defendant. Something of this sort was intimated on the argument.

Failing this, the case must go to the jury, if the Judge thinks the undisputed facts would warrant a verdict for plaintiff, in view of the probable denial of defendant on oath, and of the whole evidence. I still think there is no ground on which further and better particulars can be ordered; and the motion must be dismissed. Costs in the cause.

CARTWRIGHT, MASTER. APRIL 30TH, 1907.

CHAMBERS.

MADILL v. McCONNELL.

Parties—Action to Set aside Probate of Will—Next of Kin—Representation—Substituted Service—Extension of Time for Delivery of Statement of Claim—Costs.

The plaintiffs in this action sought to set aside the probate of the will of one Joseph Madill, on the ground of undue influence, etc., or to set aside the bequest of the residue, which comprised the bulk of the testator's estate, to the Presbyterian Church, on the same ground. The action was commenced on 27th December, 1906. All the defendants had appeared, the last appearance having been entered on 27th March, 1907. All the next of kin of deceased were parties, except 3, 2 of whom resided in Manitoba. The third had disappeared, and his residence could not be ascertained.

Plaintiffs moved to have these next of kin added as defendants, for an order authorizing some of those already parties to represent them, and for substituted service on

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them when so added, and to extend the time for delivery of statement of claim.

N. B. Gash, for plaintiffs.

C. H. Porter, for executors.

H. Cassels, K.C., for Presbyterian Church.

THE MASTER:—It is quite clear from Cornell v. Smith, 14 P. R. 275, and Clifton v. Crawford, 18 P. R. 316, that, as there is no difficulty in serving the two persons who reside in Manitoba, they should be made parties, and an order may go for that purpose. As to the missing man, an order must be made in Court if he is to be represented by any of the other parties: see Holmested & Langton, 3rd ed., p. 359. There will be no necessity for any order for substituted service, nor could such an order be properly made in Chambers under the existing circumstances.

As to the motion for an order extending the time for delivery of statement of claim, it does not seem that any order is necessary. One at least of the defendants resides in England, and her appearance on 27th March would seem to shew that there was no inexcusable delay on the part of the plaintiffs. I refer on this point to Foley v. Lee, 12 P. R. 371.

Objection was made that the trial would now be thrown over until the autumn sittings. This is unfortunate, and no reason is given why this motion was not made earlier. If there is any place at all convenient at which the trial could be had before vacation, it will be open to defendants to move to have this done. I fear, however, that at this date it will scarcely be possible.

The costs of this motion must be to defendants in any event, unless the trial Judge gives other directions as to costs.

There is no reason given why these 3 next of kin were not made parties in the first instance, as laid down in Cornell v. Smith, supra.

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CHAMBERS.

SPALDING v. CANADIAN PACIFIC R. W. CO.

Particulars — Statement of Claim — Negligence—Absence of Affidavit—No Necessity for Particulars before Pleading.

Motion by defendants for particulars of the negligence and want of care alleged in the statement of claim, the allegation being that the plaintiff, while travelling on a ticket on defendants' train, was injured by the train leaving the rails, "owing to the negligence and want of care of the defendants."

G. A. Walker (MacMurchy & Denison), for defendants.

W. N. Ferguson, for plaintiff.

THE MASTER:—There is no affidavit that defendants cannot plead without having particulars. The only possible defences would seem to be: (1) denial of any injury; (2) that plaintiff was a trespasser; (3) that he was the cause of his own injury; (4) that there was no accident; (5) that, if there was, it was not caused by anything for which defendants are responsible.

If plaintiff is relying on anything beyond the fact that he was injured, and intends to charge the company with any specific negligence, this will be made clear on the examination for discovery, if defendants think well to have it.

But plaintiff will presumably rely on the principle of res ipsa loquitur, and leave defendants to shew some sufficient ground for escaping liability.

At present it does not appear that particulars are necessary, and the motion will be dismissed with costs to plaintiff in the cause.

The defendants should plead within a week.

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BRITTON, J. APRIL 30TH, 1907.

TRIAL.

SOULSBY v. CITY OF TORONTO.

Negligence—Municipal Corporation—Public Park — Gate at Railway Crossing—Watchman—Gate Left Open — Signal that Track Clear — Injury to Person Crossing Track — Liability of Corporation—Duty—Neglect to Perform.

Action for damages for personal injuries sustained by plaintiff by reason of the alleged negligence of defendants.

J. M. Godfrey, for plaintiff.

J. S. Fullerton, K.C., for defendants.

BRITTON, J.:—On 30th October, 1906, plaintiff was employed as the driver of a baker's delivery waggon, and was delivering bread to customers in the western part of the city of Toronto. On that day plaintiff entered High Park, and drove along the road through the park which leads out of the park across the tracks of the Grand Trunk Railway, and to the Lake Shore road. Within the park, and near the railway crossing, the city corporation have erected gates, and during the season when the park is most frequented the city corporation keep a watchman at the gate nearest the crossing, keeping it open for users of the road when there is no danger from passing trains, and closing it when trains are approaching this crossing. The plaintiff by his state-
are approaching this crossing. The plaintiff by his statement
of claim alleges that on the day mentioned he was approaching the crossing along the road in High Park, intending to proceed to the Lake Shore road. When he arrived at the crossing, he found the gate open, and, relying upon that fact as notice to him that no train was approaching, he proceeded to cross the tracks, and while so crossing was struck by a train and seriously injured.

At the close of the evidence, counsel for defendants asked that the action be dismissed, on the grounds that no actionable negligence had been shewn, and that plaintiff was guilty of contributory negligence. It was then agreed that the only thing to be left to the jury was the assessment of damages, and that I should dispose of all other questions, subject to the right of the parties to appeal.

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The jury assessed plaintiff's damages, contingent upon his right to recover, at $1,000.

In my opinion, no duty was cast upon defendants of erecting or maintaining the gate or of keeping the watchman at the crossing where the accident happened.

Here, as in Moore v. City of Toronto, 26 O. R. 59 n., "the principles which determine liability as for negligence are to be drawn from cases as to the permissive use of premises rather than those of invitation to use and come upon property of another." Many cases are cited which emphasize the distinction. The report appears with Schmidt v. Town of Berlin, 26 O. R. 54, in which case it was held that the town corporation were not liable to a mere licensee for personal injuries sustained owing to want of repair of the building. In that case, there was the express finding that the defendants had not knowledge at or before the accident that the building was in a dangerous condition, but that appears not to have been the determining factor in the case.

The people are allowed to use High Park and to use the roads made by defendants in the park. If an accident had occurred because there was in the road a dangerous excavation, or upon it a dangerous obstruction, of which the defendants had actual or constructive notice, the case might have been different. Here the road itself is not complained of; the danger was by reason of something outside of and beyond defendants' control. The accident was by reason of a moving engine, upon the railway property and managed and controlled by the railway company. The road, since improved by the defendants, was originally, it is said, a farm crossing for the land now owned by the city corporation and called "High Park." While it was a farm crossing it was the duty of the railway company to erect and maintain fences and gates, and, as between the railway company and the land owners, the persons for whose use the farm crossings were furnished were bound to keep the gates closed when not in use. That, however, does not, in my opinion, create the duty on the part of defendants, and as between them and any person using the road through the park, of erecting gates and keeping a watchman on that part of the road, which has long since ceased to be a farm crossing.

The duty cast upon the railway company is to erect and maintain "upon the railway" fences, gates, etc.

The liability, if any, on the part of the defendants does not extend beyond keeping the roadway in repair or free

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from dangerous pitfalls and obstructions, of which they have or may be deemed to have notice. See Marshall v. Industrial Exhibition Association, 1 O. L. R. 319.

In Graham v. Commissioners for Queen Victoria Niagara Falls Park, 28 O. R. 1, it was held that there is no liability on the part of the commissioners to the public using the highways by reason of the absence or insufficiency of a fence, railing, or barrier on the edge of the cliff, there being no statutory obligation in that behalf imposed on them. That case was decided in favour of the defendants irrespective of their being servants of the Crown. If the road in this park is not a highway no duty is imposed — certainly none beyond keeping it, as a road, in reasonable repair. If the road is a highway then—to quote from the case last cited (p. 7)—"These cases establish that, in the absence of some statutory provision imposing such a duty on a person or corporation in whom a highway is vested, the duty does not exist, and that where such a duty does exist, in the absence of a provision giving a right of action to persons suffering in consequence of a failure to discharge it, an action will not lie for mere nonfeasance, though it would be otherwise if the want of repair was due to misfeasance of the person or corporation upon whom the duty is cast." . . .

In that case many cases were cited and fully considered, and among those were cases relied upon by counsel for plaintiff as authority for the maintenance of this action. In that case, one of the Judges described the place where the accident happened as "a veritable trap," and the plaintiff was seriously injured.

In the present case there was no unusual danger, and whatever danger there was was known to the plaintiff as well as to defendants. . . .

[Stapley v. London, Brighton, and South Coast R. W. Co., L. R. 1 Ex. 21, distinguished.]

It was argued that, even if defendants were not compelled to establish the gate and employ the watchman, having undertaken it, plaintiff was entitled to rely upon its continuance, at least until notice actual or constructive to the contrary.

Skelton v. London and North Western R. W. Co., L. R. 2 C. P. 631, is against plaintiff's contention. . . .

Here plaintiff found the gate open, but did not see the watchman. That in itself should have suggested to plain-

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tiff the possibility at least that the gate was open, not as an intimation that there was no danger, but that the watchman had been withdrawn—that there was no watchman in fact. No inquiry was made. Plaintiff thought the watchman was in his cabin—if so, he was not attending to the gate. Plaintiff knew of the railway, that this road led across it, and he knew of the ordinary danger at any railway crossing, and had these all in mind, so there was nothing to relieve plaintiff of the duty of taking care and using caution when the crossing was reached, unless that care and caution were unnecessary by the fact of the gate being open.

The plaintiff relied upon Baxter v. Jones, 6 O. L. R. 360, 2 O. W. R. 573, and upon cases cited in Anson on Contracts. 10th ed., p. 98. One case is where a person undertook gratuitously to effect insurance upon another person's house, and having failed to do so was held liable. These cases, which are cases of mandate, and nothing of the kind exists here, are said to rest upon this broad ground, as stated by Willes, J., in the Skelton case, that, if a person undertakes to perform a voluntary act, he is liable if he performs it improperly—but not if he neglects to perform it. The charge here is that a watchman employed did not do his duty properly. He was not at the gate at all. He was, as to the plaintiff and the public, when this accident happened, the same as during the night time—or during the rest of the year after October—when withdrawn from the gate.

I do not think defendants are liable for merely leaving the gate open, as there is not, in my opinion, any duty to keep the gate closed at the time of approaching or passing trains.

Plaintiff's own account of the accident is as follows: "I was coming through High Park, and when I got to the incline where you go out of the gate I pulled up there. I almost pulled up, I did not stop exactly, just almost stopped, and I gave a look, and there was no train or anything in sight, there was no noise or bell ringing, and I ventured to cross, thinking every other time the watchman came out and either put out his stick or flag, and, not seeing him to do this, I thought he was in the cabin. I ventured to cross. I thought my track was clear, but the train came along, and, when it was as far as from me to Mr. Godfrey, blew its whistle and I was struck. . . ." The distance

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to Mr. Godfrey was called about 10 yards. The horse got over the south track and was not killed. The locomotive struck the rear end of plaintiff's waggon. "The gates were kept up when the track was clear." "I looked, that is the reason I thought my track was clear." "When I saw the gate up I started to go across." "This was about 4 o'clock in the afternoon." "I thought the watchman was in his cabin." "It was that cold day . . . on account of the cold day." "I thought he was in the cabin, and I thought my track was clear, and I ventured to cross."

This all goes to shew that the unfortunate plaintiff had the means of knowing, and did in fact know, as much as the gate keeper would have known had he been at the time at his cabin.

Baker (the gate-keeper) had no time tables. He was not in communication with the railway people, but, simply upon hearing or seeing a train approaching, he was accustomed to close the gate. Suppose he had been at his post and had not seen or heard more than plaintiff did, plaintiff could hardly impute that as negligence. The only means Baker has of knowing when to close the gate was to look and listen. Plaintiff had that same opportunity; he did look; his only complaint is that he did not get the warning or prohibition implied by a closed gate.

The accident is, like others, a very regrettable one, and I would be very glad if defendants could see their way to assist plaintiff in some way, but, as I think plaintiff not entitled in law to recover, I must dismiss the action, and I do so without costs.

APRIL 30TH, 1907.

DIVISIONAL COURT.

GRIFFITHS v. GRAND TRUNK R. W. CO.

Conversion—Detention of Goods—Demand and Refusal—Qualified Refusal—Proof of Title and Ownership of Goods—Delay to Obtain Solicitor's Advice—Absence of Bona Fides—Defendant's Right to Return Goods after Action and Obtain Stay of Proceedings—Practice since Judicature Act—Damages.

Appeal by defendants from judgment of CLUTE, J., in favour of plaintiff for $7,200 in an action for damages for

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detention and conversion of certain dump cars used in construction work.

D. L. McCarthy, for defendants.

G. C. Gibbons, K.C., for plaintiff.

The judgment of the Court (FALCONBRIDGE, C.J., BRITTON, J., RIDDELL, J.), was delivered by

RIDDELL, J.:— . . . Messrs. Breen & Butler, contractors, were the owners of certain steam shovels (3), and dump cars (32), which they had been using on the line of defendants. On finishing their contract, they left these on the line, and subsequently sold them to plaintiff. In June, 1905, plaintiff notified defendants that he owned these articles, which were then at Bridgeburg or near there. In that letter, 13th June, 1905, he suggested that the use which defendants had made of the cars should offset the use by him of the cars of defendants which were loaded with the steam shovels. A speedy reply came on 19th June saying that defendants were agreeable to the articles remaining as they were for 2 or 3 months longer. On 1st July he writes saying he is desirous of taking the shovels out of Canada, and says: "I now think we will need the cars also for use at once, but will advise you later concerning them." On 2nd July he is answered: "It will be satisfactory to allow the steam shovels and cars (formerly the property of Messrs. P. Breen & Co.) to stand on our tracks at Fort Erie for 3 or 4 months longer, at your risk, with the understanding that this and the use of our cars loaded with the booms of the shovels shall, as you suggest, offset the use we have made and are making of your dump cars." It will be seen that thus early defendants were dealing with the articles on the footing that they were the property of plaintiff. On 6th July plaintiff wires asking to be permitted to take "them," apparently the shovels, and on 7th July a telegram is sent him: "Your telegram yesterday. The steam shovels and other equipment now at Fort Erie were left in our care by Messrs. Breen & Butler, and we have not any legal authority to allow them to be moved; therefore cannot allow them to be taken from Fort Erie until you have established to our satisfaction your right of ownership." Upon plaintiff asking by telegraph what more he can do, and some further telegrams passing between the parties, on 11th July Mr.

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McGuigan, defendants' officer, who for all purposes in this action may be considered the company's responsible agent, wires: "Please present papers to Messrs. M., S., B., and M., attorneys, Buffalo, and on advice from them that they give satisfactory evidence of your right to the steam shovels and other property of Messrs. Breen & Butler in our possession, our superintendent at St. Thomas, Mr. Cunningham, will turn the steam shovels now on our tracks at Fort Erie over to you as desired." Plaintiff had the papers taken to the Buffalo attorneys, who were satisfied as to his right to the property, and he sent his agent after the shovels and cars.

One would think that now at length the right of plaintiff to the property was established to the satisfaction of defendants. There is some dispute as to the place at which the cars were at that time. Sinte, plaintiff's agent, says they were at defendants' yard at Fort Erie, being used with a Grand Trunk Railway steam shovel putting in a new siding. He says he asked for both shovels and cars. The employees of defendants say that Sinte did not ask for the cars but only for the shovels, and that the cars were then stored on the siding in the south yard. This does not seem to be material. There is no doubt that the title of the cars is and was in the same condition as that of the shovels, and that the Buffalo attorneys passed upon and approved of the title to both. The shovels were handed over by defendants to plaintiff's agent on 14th July.

On 11th August plaintiff writes Mr. McGuigan asking where his cars are located, and offering to sell them for $375.50 each. The answer, which is written on 30th August, does not say where the cars are, but says that they can build as good a car or better for less than half the price named; it also says that defendants have used the cars considerably. Nothing further seems to have taken place till January, 1906. On that day plaintiff writes Mr. McGuigan complaining of the usage defendants had given the shovels, of the expense he had been put to ($400) in getting possession of them. On 29th January Mr. McGuigan writes explaining that they had no knowledge, official or otherwise, of his ownership of the shovels, and adds: "There was no delay whatever in turning the shovels over to you after our legal representatives were satisfied on the point." He further offers $100 each for the dump cars. Again we find an express acknowledgment of the title of plaintiff

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and an attempt to deal with him and buy the cars from him on the footing of his being the owner. . . .

On 8th March, 1906, plaintiff writes offering to accept $275 per car, and adds: "Kindly advise me where the cars are so that I may pay car fare from here (Chicago) to see them and ascertain their present value, so that I may have you pay the damage, as well as for the track and fittings you took off my three shovels. . . . You certainly cannot take my cars, use them in rock work and ruin them, and not expect to pay for them." He is then informed by telegram that his cars are in the vicinity of London—but this apparently after he had requested a telegram advising him where his cars were. A letter is written the same day by Mr. McGuigan: "The dump cars in question are all in the vicinity of London, Ont., and you may take charge of them at any time upon furnishing us with sufficient notice in advance to enable us to assemble them, and upon giving us an affidavit (satisfactory to our legal department) establishing your ownership of the cars."

On 15th March plaintiff wires: "Where near London can I find dump cars? You must pay for their use. You cannot confiscate my property." To which McGuigan answers by telegram 16th March: "Replying to your wire yesterday, dump cars you refer to are stored at Komoka gravel pit 10 miles west of London; on presentation of evidence of ownership satisfactory to our legal department and adjustment of storage charges for about 3 years, there will be no difficulty in regard to delivery of the cars." . . .

Then on 15th April plaintiff left his home, Chicago, and came to London, saw Mr. Gillen, the defendants' superintendent, who was a servant inferior to McGuigan and under his orders, shewed him the documents of title, was told by Mr. Gilen that they were entirely satisfactory, but that it would be well for him to see Mr. Brownlee at Toronto. . . . He did so on the evening of 6th April, and shewed him the papers; in the morning Brownlee said this was satisfactory, but that he had better get a letter from Breen & Butler. He got this letter and handed it to Brownlee the same evening. Plaintiff explained that he wanted the cars badly . . . . Brownlee, the plaintiff swears, then said it would be all right, the cars would be loaded for plaintiff. Brownlee swears that he got these papers on 6th April; that the following day he caused copies to be made and sent to the solicitor of the company,

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and that he told plaintiff that he would let him know the result. He says that plaintiff was very urgent for immediate delivery, but that he informed him that he could not deliver the cars to him until these papers were submitted to the legal department at Montreal, and he (Brownlee) should get permission to deliver the cars.

Then on 9th April Brownlee telegraphs to plaintiff: "Original arrangements for use of cars were made with Breen & Butler, and, as you were not known in the transaction, desire that you give me written assurance that you will not present claim hereafter for damage or use of cars. On receipt of this assurance will load on flat cars and deliver to connecting line at Detroit." And, as Brownlee says, he took the distinct ground that he would not give up the cars unless he got a release of any claim for their use.

On 10th April plaintiff wired: "I demand that the cars be promptly delivered to me. They are mine, and you have no right to detain them or impose any conditions." To which Brownlee answered the same day: "Will forward cars when I receive waiver requested in my wire yesterday." He says that he was instructed to send the telegrams he did send, refusing to give up the cars . . . but he says the reason it was so sent by him was because he had not received advice from the legal department, though he admits he told nothing of any such reason to plaintiff.

It seems clear that plaintiff had a right to consider, after being told by Brownlee on 7th April that he (Brownlee) would let him know the result of sending the papers to the solicitors in Montreal, that the communication sent him on 9th April, unsolicited as it was, was the conclusion of defendants. I am unable to understand in what other light he could view it—and clearly Brownlee had instructions to take the stand he did.

Plaintiff then came to London and consulted solicitors, and they on 11th April wrote Mr. Brownlee stating that plaintiff had instructed them to write in regard to the detention or conversion of the cars, and saying that the loss of plaintiff was $9,000. On 13th April plaintiff wired Brownlee: "Leave instructions with your operator Hamilton to-morrow morning what you can do about cars." Brownlee replied: "Have received notice from your solicitors at London of your claim for $9,000, which has been referred to the management at Montreal." The solicitors, not having received any answer to their letter of 11th

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April, wrote again on 14th April, saying: "He has been needing very badly his dump cars which you have declined to deliver unless he waives any claim for past use. This we cannot advise him to do, and do not see any reason why you should use his cars and not pay for them."

No answer having been received, a writ was issued on 19th April and sent by mail to Montreal to defendants' general solicitor. On the same day defendants acknowledge the receipt of the letter of 11th April and say that it has been referred to the general solicitor. Brownlee says that either on the 19th or 20th he received advice from defendants, which emanated from the solicitor's office, to deliver the cars to plaintiff. On 20th April he telegraphs plaintiff's solicitors from Toronto: "Your letter of 11th April. The 32 dump cars are in London subject to orders from Mr. John Griffiths. Please obtain disposition, as additional demurrage charges are accruing."

This may possibly be taken as an offer to deliver up the cars, but it is to be noticed that "additional demurrage charges" are accruing, and appears to indicate that defendants still were claiming certain charges already accrued. However that may be, no further attempt was made by defendants to put themselves right; an appearance was entered; a statement of claim was delivered claiming the value of the cars as on a conversion, and also payment for the use of the cars before the conversion; defendants, in addition to denying the claim of plaintiff, counterclaimed for storage. . . .

The trial Judge gave judgment for plaintiff for the value of the cars at $200 each, $6,400, and for the use of the cars $800, in all $7,200.

No evidence was given on the counterclaim, and it does not seem to have been pressed at the trial. It was dismissed without costs. . . .

As to the counterclaim and the claim for $800, I would say at once that there does not seem to be the slightest ground upon which the findings of the trial Judge can be successfully attacked.

As to the conversion Mr. McCarthy frankly admits that there was not in fact and in law the smallest reason why the cars should not have been given up when demanded. But he contends that the refusal was only a qualified one, and that there was no conversion, as the delay in giving

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up the cars was due to a bona fide desire to obtain solicitor's opinion. . . .

After the proof of title in July, 1905, and the negotiations as to the purchase and use of the cars, proof of the title early in April, 1906, does not seem to me a necessity for plaintiff. But in any case he furnished evidence of title by at latest 7th April, and then 2 days after is told in effect that he cannot have his property unless he will waive a claim which has been adjudicated upon in his favour to the extent of $800. This refusal is said to be qualified—it was coupled with a condition which defendants had no right to impose, and "that is tantamount to an absolute refusal:" Davies v. Minshall, 6 Q. B. 443, 450; Cobbett v. Chilton, 2 C. & P. 471; Barnett v. Crystal Palace Co., 2 F. & F. 443; Clark v. Chamberlain, 2 M. & W. 78.

But it is said that defendants had a right to take the advice of a solicitor as to the rights of plaintiff. I doubt that very much after the transactions between the parties. But, grant that this be the case, they do not make that the ground of the refusal. Even if it had been qualified as I have held that it was not, the law seems to be that where one has the right to retain goods on any specific ground, then, if he claims to retain them on grounds quite distinct from such legal ground, retention on such claim will be evidence of conversion, and the existence of the legal ground will furnish no answer to an action. At least this has been decided in the case of a lien: Counce v. Stanton, 7 M. & G. 903; Deeks v. Richards, 4 M. & G. 534; Weeks v. Goode, 6 C. B. N. S. 367; Llado v. Morgan, 23 C. P. 517.

Moreover, it is only where defendant has a bona fide doubt as to the title of plaintiff that he is entitled to time being given him to clear it up. Was there any bona fide doubt as to the title of plaintiff? . . . The finding of the trial Judge that the delay was made for the express purpose of getting rid of any liability of paying anything for the user of the property, implies a finding against the good faith of defendants. This finding is well warranted by the evidence, and should not be disturbed. And, lastly upon this point, the time to which one in possession of the goods of another, and having a bona fide doubt as to the title to the goods, must be a reasonable one; and I have no hesitation in saying that the time from full proof of title

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for the second time to the teste of the writ was much more than a reasonable time. . .

There was ample evidence of conversion, and the trial Judge was right in holding that defendants are liable as for a conversion.

We were told on the argument that the practice of defendants coming into Court after a conversion and applying for a stay has been abrogated. . . .

[Reference to Hirst v. London and North Western R. W. Co., 4 Ex. D. 188, per Bramwell, L.J., at p. 195; Driffil v. McFaul, 41 U. C. R. 313.]

None of us had ever heard of the abrogation of this useful practice, and no case was cited nor have I found one so deciding. On the contrary, it seems to me that the effect of sec. 128 of the Ontario Judicature Act is to continue that practice. . . .

[Reference to Jackson v. Litchfield, 8 Q. B. D. 477, per Brett, L.J.]

It would be absurd to suppose that such a power could be taken away from the Court except by express enactment. We are told that no case where such a power has been exercised by the Court since the Judicature Act has been reported. That, if a fact, proves nothing except: (1) that no defendant has thought fit to offer back the goods converted; or (2) if so, no plaintiff has refused to accept; (3) or that no application was made to the Court; (4) or, if such application was made, it was not resisted; (5) or, the case was not brought to the attention of the reporter; or (6) it was not thought necessary or advisable to print such a report.

I have examined a great many text books on Torts and the books on Practice, and I cannot find that any change has been made in the power of the Court. . . .

[Reference to Mayne on Damages, 5th ed. (1894), p. 400; Fisher v. Prince, 3 Burr. 1364; Clerk & Lindsell on Torts, 4th ed. (1906), p. 281.]

If, as defendants contended, the practice has been done away with, they must pay the full value of the goods. If, as I find, the practice still is in force, while there can be no doubt that the Court at any time, and even after trial and verdict, will exercise its equitable power in reducing damages, that is only done after trial and verdict where some subsequent matter renders it unjust that the whole amount should be recovered: Mayne on Damages, 3rd ed.,

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Appeal dismissed w

CARTWRIGHT, MASTER.

ARNO

Particulars—Statement
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Meruit—Defence of

Motion by defendar
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dered to defendant.

F. E. Hodgins, K.C

R. McKay, for plai

THE MASTER:—Th
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6. The plaintiff acted for and on behalf of the said defendant in connection with the matters referred to in paragraph 4 hereof and in connection with the said criminal charge, and was engaged upon said matters from the 18th day of October, 1906, to the 4th day of February, 1907, in interviewing various parties, attending upon numerous persons in connection with the said matters, being engaged for 22 days in Court upon the prosecution of the said defendant, conducting the defence of the said defendant, with the result finally that the said defendant was tried upon the said charge before George T. Denison, police magistrate for the city of Toronto, and was acquitted upon the said charge made against him.

"7. The said services so performed by plaintiff for the said defendant are of the value of $7,500."

Before the action began there was a correspondence from 4th to 22nd March with a view to settlement by way of reference, consisting of 23 letters . . . Special reference is made to plaintiff's letters to defendant of 8th March and . . . 12th March as shewing that "plaintiff has, in addition to his services in the police court case of Rex v. Cockburn, included in the present demand charges against me (the defendant) for work done without my instructions or knowledge, or which were not properly chargeable to me."

On 10th April the statement of claim was delivered. The next day the defendant demanded particulars as follows:—

1. The days and times on which plaintiff acted for and on behalf of defendant and the time occupied on such days: (a) in reference to the criminal proceedings against defendant referred to in paragraph 4 of the statement of claim; (b) in connection with the other proceedings referred to in said paragraph.

2. The various parties interviewed as stated in paragraph 6 of the statement of claim and the dates on which they were interviewed, and the length of time occupied.

3. The persons attended upon as alleged in said paragraph 6 in connection with the said matter and the length of time occupied in each case.

4. Particulars shewing what were the various matters and transactions in connection with the Ontario Bank referred to in paragraph 4 in which plaintiff alleges in paragraph 6 he acted for defendant.

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5. Details of the time occupied by plaintiff in performing the services alleged to be of the value of $7,500.

It was urged in support of the motion that some time prior to 4th March, as shewn by letters of that date, plaintiff had asked defendant for $5,000, and plaintiff's subsequent letter of 8th March states that such demand was made for that sum on 13th February only "in consideration for defendant and for the purpose of immediate settlement which plaintiff expected as a matter of common gratitude." This not having been paid, the letter of 13th February and sum named therein were withdrawn, and, instead, plaintiff rendered his "final account for $7,500, on which I take my stand as the quantum meruit which I am entitled to for the services rendered you." This letter was accompanied by a detailed account of disbursements amounting to $28.58 (which was promptly paid into Court and taken out by plaintiff), and also by the following memorandum:—

1906 Oct. 18 to 1907 Feb. 4.	Rex v. Cockburn—Retainer and professional services continuous between these dates, including 22 days calling for presence in Court and innumerable conferences and consultations and advising in this very urgent and important case, resulting in failure of prosecution and your discharge.	
	Fee to Mr. Arnoldi	$7,500 00
	Disbursements as per memo. attached..	28 58
		$7,528 58

It was pointed out that defendant had already paid into Court $1,000, but, as there is no tariff in criminal matters, and as no details are given in the memorandum of 8th March, and no specific statements of plaintiff's services appear in the pleading. defendant is at a loss to know what exactly he is being charged for; apart from the criminal charge, and what were the services in respect of that charge other than the attendances in Court.

On the other hand it was urged that the issues raised by the statement of claim were simple enough, and that defendant need not be in any difficulty in: (1) denying employment of plaintiff in respect of anything else than the criminal charge; and (2) denying that services for which he is liable were worth $7,500 or any greater sum than he is advised to pay into Court on that account. . . .

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[Reference to Re R. L. Johnston, a Solicitor, 3 O. L. R. 1.]

It was contended that defendant was entitled to know how the sum of $7,500 was arrived at, especially when it had first been stated at $5,000; and it was argued that such details could certainly be asked for on discovery. No objection was made on the ground that plaintiff was being asked to disclose his evidence.

Had the services of plaintiff been rendered in a civil action, he would have been obliged to deliver a detailed bill before he could take any steps to recover from defendant either on taxation or by action.

It was open to plaintiff to have made some definite bargain before undertaking defendant's case. This, if I am correctly informed, is the course usually taken in criminal matters, and such a bargain would not come under the judgment in such cases as Re McBrady & O'Connor, 19 P. R. 37.

Here plaintiff is avowedly suing on a quantum meruit, and on that basis he estimates his services at $7,500. Such cases are dealt with in Odgers on Pleading, 5th ed., at pp. 194, 398. . . .

In view of the foregoing considerations, and of the fact that plaintiff has increased his original claim from $5,000 to $7,500, I think defendant is entitled to some particulars of such a substantial claim, and to know why it has been so largely increased. The only question is whether he is entitled to all he has asked.

Had the 4th paragraph of the statement of claim not been attracted to the 6th, it would only have been introductory. As it is, it has been made part of paragraph 6, and must be dealt with accordingly.

The memorandum of 8th March gives the period in which the services were rendered. This, exclusive of Sundays and holidays, would amount to about 90 days. This would require an allowance of nearly $85 a day for the whole period to make up $7,500. Without expressing any opinion that this sum is excessive, I think it is such a substantial claim that defendant is entitled to know how it has been arrived at before delivery of his defence.

If plaintiff was engaged during the whole of the above period, he can say so, and that will perhaps comply with paragraph 1 of defendant's demand. He should also give the particulars asked for under paragraphs 2 and 3, so far

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RIDDELL, J.

MORITZ v. CANAI

Foreign Judgment—Actio
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Action to recover the
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G. Lynch-Staunton, K

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tween the price at which they sold and the price at which the plaintiffs had contracted to sell to their customer—at least if the vendors knew at the time of their contract that the goods were being bought for resale: Borries v. Hutchinson, 18 C. B. N. S. 445. And, even if they did not know this at the time of the contract, they must pay as damages the difference between the value of the goods at the time of the breach and the contract price. No better way of determining the value of goods exists than to find out the price at which they can be sold, or have in good faith been sold. Here the value was determined by such a sale, and I think that the true measure of damages is that taken in England, namely, the resale price less the contract price. See France v. Gaudet, L. R. 6 Q. B. 199; Die Elbinge, etc., v. Armstrong, L. R. 9 Q. B. 473; Hinde v. Liddell, L. R. 10 Q. B. 265.

It remains to dispose of the question of the costs on the English judgment and of the costs of this action.

I have held that the plaintiffs are entitled to succeed upon the judgment, and, if so, I see no good reason why in succeeding on the judgment, so far as it relates to the damages, they should not also be entitled here to the costs on the English judgment. This seems to have been taken for granted in Fowler v. Vail, 27 C. P. 417; Court v. Scott, 32 C. P. 148; Solmes v. Stafford, 16 P. R. 78, 264. Had the action been brought on the judgment alone, the plaintiffs would also be entitled to their costs in this action. But they have brought the action not alone on the judgment, but also on the original cause of action. If I am right, this was unnecessary, and the defendants should not be called upon to pay the costs of unnecessary proceedings. The defendants should have paid the amount of damages without action, and, failing this, should have, after action in England and judgment there, paid the amount of the judgment and costs; failing this, they should not have disputed the jurisdiction of the English Court when action was brought here, and at the very least they should not have disputed the amount of damages. They, therefore, should have no costs of these unnecessary proceedings.

Plaintiffs may, at their option, have judgment: (1) for the amount of the damages and costs set out in the English judgment, with interest on each from the date of the judgment to the teste of the writ of this action, calculated at 4 per cent. per annum (see Snow's Notes on English Rules 594

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and 976), and after the teste of the writ at 5 per cent. till judgment, with costs in this action limited to the costs which would have been incurred and have been necessarily incurred in establishing this cause of action, whether such costs be by way of examination for discovery, commission evidence, or otherwise howsoever; or (2) for the amount of damages I now find, i.e., the amount mentioned as damages in the English judgment, but without interest, and costs in this action limited to the costs which would have been incurred and have been necessarily incurred in establishing the cause of action upon the original contracts, costs being inclusive as above. Election to be made in 10 days.

MACMAHON, J. MAY 2ND, 1907.

TRIAL.

OSBORNE v. DEAN.

Carrier—Ship—Detention of Goods Carried—Replevin—Damages—Freight—Demurrage—Costs—Set-off.

Action for conversion and detinue. Counterclaim for freight and demurrage.

W. A. Finlayson, Midland, for plaintiffs.

D. S. Storey, Midland, and D. Ross, Barrie, for defendant.

MACMAHON, J.:—The defendant . . . had purchased the schooner "Albatross" and cut her down, converting her into an open barge. . . . The first service she performed as a barge was in carrying tan bark for plaintiffs, who carry on business at Midland and are the owners of the tug "Maude." They had entered into a contract with Beardmore & Co., of Toronto, to carry a quantity of tan bark from Blackstone, a village on the Georgian Bay, to Midland, there to be loaded on the Grand Trunk Railway cars. They wished to charter defendant's barge to be towed and navigated under their own direction, but this the defendant refused, as he wanted to navigate the vessel himself. It was then agreed that the "Albatross" should make a trial trip to Blackstone, to be towed there and back to

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Midland by plaintiffs' tug. This trip commenced on 21st September, and occupied 16 days going and returning, carrying 212 cords of bark to Midland. The barge ran on the rocks at a place called "the Narrows" on the 21st, and was hauled off on the 22nd.

No complaint was made by defendant as to want of despatch in loading or unloading, or as to the measurement of the bark, and he was so well satisfied with the result that he on the day the unloading was completed (8th October) entered into a written contract with plaintiffs to carry bark from Blackstone for 40 cents a cord, which was the only agreement entered into as to the freight charges.

On the second trip the barge left Midland on 16th October and arrived at Blackstone the same night, and I find was loaded with despatch. . . . The round trip occupied 16 days. . . .

The third trip took 21 days, leaving Midland on 9th November and returning on the 29th. . . . Defendant's barge was detained at Blackstone 4 days beyond the time in which it should have been loaded, by reason of plaintiffs' men leaving the camp in consequence of the want of provisions, and also by reason of plaintiffs having supplied only one lighter with which to load the barge from the shore. And, although so much time was occupied in loading, only 125 cords of bark were shipped on the barge.

Plaintiffs' tug with the barge in tow arrived at Midland on the afternoon of 28th November, and tied up at the wharf where she had unloaded her former cargoes. A statement of account was then presented by plaintiff Osborne to defendant, giving the number of cords of bark carried by the barge on the first and second trips respectively at 212 and 199 cords, and, after giving defendant credit for the freight at the rate agreed upon and debiting what had been paid on account, there was a balance due defendant on these two cargoes of $22.27.

Defendant said that plaintiff Osborne spoke of the bark being weighed by the railway company, and that a cord of bark weighed a gross ton, 2,240 lbs.; and that he (defendant) said he wanted no weighing of the bark—that he required to be paid by the measurement on the cars. The bark had been measured in the pile at Blackstone before being put on the barge. Defendant became dissatisfied, and during the night removed the barge from the wharf 150 feet out into the bay. The following morning defendant

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went to plaintiffs' office,
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on which freight was paid by the latter, allowing 2,240 lbs. to the cord, corresponds very closely with the measurement of the number of cords for which plaintiffs gave defendant credit. I therefore find that the credits given by plaintiffs to defendant for the bark carried are the proper credits. In addition, I allow defendant $2 as freight on the railway iron, barrows, etc.

Plaintiffs on 28th December, 1906, obtained an order for replevin of the bark, and the sheriff . . . replevied the tan bark contained in the barge and the railway iron, barrows, etc., and delivered the same to plaintiffs at the railway wharf at Midland, but, to enable him to do so, the ice between where the barge had been frozen in the bay and the railway wharf had to be cut, at a cost of $40.46, which was paid by the sheriff and charged to plaintiffs. . . .

[Reference to Clink v. Radford, [1891] 1 Q. B. 624; Crossman v. Burrell, 179 U. S. 100; Hansen v. Harrold, [1894] 1 Q. B. 612; Williams v. Cantlin, [1901] A. C. 469.]

In the present case there was no charterparty; and I find there was no stipulation by plaintiffs to load or unload the barge within a certain time—called lay days. Consequently there was no provision made for demurrage days. . . . Nielsen v. Wait, 16 Q. B. D. 70. . . .

Defendant is entitled to damages for the unreasonable detention of the barge in loading during the third trip, which I assess at $40.

There will be judgment for plaintiffs for the return to them of the 125 cords of tanbark . . . and $5 damages for the detention thereof, and also for the $40.46 paid to the sheriff.

And there will be judgment for defendant for $52, being the freight on the third cargo, . . . and for $22.27, balance for freight on the first and second cargoes, and for $40 damages for detention.

Defendant must pay the costs of the action.

Plaintiffs' damages and costs to be set off against the sums as above stated payable to defendant for freight and damages, and execution to issue for the balance found due to either party.

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MEREDITH, C.J. MAY 3RD, 1907.

CHAMBERS.

McKAY v. TORONTO R. W. CO.

Pleading — Statement of Claim — Amendment — Abandonment of Part of Claim after Trial—New Trial Directed—Reduction of Amount so as to Prevent Appeal to Privy Council — Workmen's Compensation Act — Allegations of Facts Proved at Trial—Terms of Amendment—Costs—Leave to Plead Statute of Limitations.

Appeal by defendants from order of Master in Chambers, ante 832, allowing amendment of statement of claim.

A. B. Morine, for defendants.

T. P. Galt, for plaintiff.

MEREDITH, C.J., dismissed the appeal with costs, adding, however, to the order a term that defendants should be allowed to plead the Statute of Limitations.

RIDDELL, J. MAY 3RD, 1907.

TRIAL.

MILLS v. SMALL.

Building Contract—Provisions of—Construction—Architect—Remuneration—Extra Work—Payment for, outside Contract—Increase in Cost—Knowledge and Acquiescence of Owner—Amount Due—Interest—Costs.

Action to recover moneys due for work done for defendant upon a theatre in Hamilton.

Some of the facts are stated in a report of a previous judgment, ante 421.

A. Bicknell, Hamilton, for plaintiffs.

J. L. Counsell, Hamilton, for defendant.

RIDDELL, J.:—The defendant is the owner of a theatre in Hamilton. On 15th May, 1905, he entered into a con-

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tract with the Fuller Claflin Theatre Building Company of New York, in the contract called "the builder." This contract is very inartistically drawn, and seems to adopt the form of contract in use when "the builder" is a builder in reality. The contract provides in article I. that the builder shall and will provide all the working drawings and specifications of every nature necessary for the execution of the work indicated by the preliminary drawings which have been prepared and which become a part of the contract. Article II. provides that the builder will secure proposals from contractors, who will furnish all the material and perform all the work indicated in the drawings under the supervision of the builder, the aggregate amount of which proposals shall not exceed $22,500. By article III. the builder is to supervise the furnishing of materials and performance of the work, and enforce upon the contractors a strict compliance with the terms of all contracts that may be entered into. Article IV. is not important to be considered here. Article V. provides that no alteration shall be made in any contractor's work except upon the written order of the owner, the amount to be paid by the owner or allowed by the contractor by virtue of such alteration to be agreed upon by the owner and contractor—and if they cannot agree, then an arbitration. Great stress is laid upon this article by the defendant. It is proper, then, to say at once that this article does not purport to determine the amount, if any, to be deducted from or added to the remuneration of the builder in case of any change; and it is obvious that this article is simply intended to protect the owner against claims of contractors as in the ordinary case of building contracts—though how this is to be accomplished without making the contractors parties to the contract does not appear. Articles VI. and VII. contain provisions as to the conduct of contractors, and as to the course which may be taken by the builder in case of default by the contractor. Article IX. is not of importance. Article X. is as follows: "It is hereby mutually agreed between the parties hereto that the sum to be paid by the owner to the builder for the work to be performed under this contract shall be $2,500, said amount to be the builder's full profit, commission, and compensation for the performance of said work. The builder hereby guarantees and covenants to keep the total expenses of the contractors' work referred to in article II. within $22,500. . . ." Then there are further provisions, some as to the contrac-

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tors, some as to the builder, but none, I think, important to be considered here.

It will be seen that "the builder" was really the architects, and that they were to procure proposals for the owner from contractors.

This contract was signed in the office at Toronto of the defendant, and at the time the defendant informed the representative of "the builder," Mr. Fuller Claflin, that Mr. Louden, his (Mr. Small's) manager at Hamilton, was authorized by him (Mr. Small) to represent him in any matter which might be necessary to discuss, and that Fuller Claflin and his superintendent Shuttleworth were to be guided by Mr. Louden, and that anything Mr. Louden said was to be done or not to be done would be authorized by him (Mr. Small).

Fuller Claflin was the most active member of "the builder" company, and he procured and furnished to the defendant a number of proposals from contractors, amongst them those of Roeser & Sumner Company for electric fittings, and of Frank Rigbetti for painting. Both these were submitted by Claflin to the defendant, and, after approval by him, were accepted by Claflin acting for him. The proposal of Roeser & Sumner Company was also discussed between the defendant and one Corstorphine, a member of the company, and the defendant appeared to be satisfied with it. There can be no doubt that the contracts were in reality and in law the contracts of the defendant.

The Roeser & Sumner Company sent their goods by express addressed to the Fuller Claflin Company, but, receiving a communication from the defendant asking them to change the bill of lading to the defendant to enable him to get the goods from the customs, they did so.

Rigbetti substantially performed the work he was called upon by his contract to perform. It is true that the defendant and his manager were not, or said they were not, satisfied with what Rigbetti did, but the architect was and is, and I believe Rigbetti when he says he did practically perform his contract. A number of objections were at the trial taken to what he had done. It was contended, for example, that where the contract provides "mouldings painted in ivory and touched with gold," while admittedly not "ivory" but "ivory-coloured paint" was meant, still "gold" meant "gold leaf," and not "gold-coloured paint."

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The evidence of Rigbetti and Stamp convinces me that such is not the reasonable interpretation of this contract.

When the work was begun, it was intended that the building should not quite cover all the land of the defendant, but that a small triangular portion of land should be left. After the work was begun, Louden noticed that this small piece was being left, and at once telegraphed Claflin: "Six feet land north-east corner of stage not being occupied in building place. Would like entire ground used. Can I instruct builders to take this in. Answer." He also telegraphed Shuttleworth, who was in Peterborough, and wrote to Claflin the same day saying that he had telephoned the defendant, who had said to take in all the available ground. I find as a fact that he did receive such instructions from the defendant, and was authorized to write and telegraph as he did; the defendant denies this. The change was accordingly made, involving a large increase in the cost of the building. There were also a number of alterations in the plans and working drawings made in the course of construction, to the knowledge and with the approval of Louden, and in some cases the defendant himself —the building costing ultimately $34,000 instead of $22,500, an increase of $11,500 over the estimate. "The builder" claimed a commission of 10 per cent. upon the amount of cost over and above the originally contemplated cost. Considering that the whole cost was $35,000, they claimed a commission of 10 per cent. on $12,500, i.e., $1,250. They also asserted that of the sum originally fixed of $2,500, the sum of $750 was still unpaid.

Roeser & Sumner Company claimed $218.50 and Rigbetti a balance of $400 of his contract price, $1,000. The plaintiff Mills claimed also a small sum due him by the defendant, amounting to $28.50. The Fuller Claflin Company, the Roeser & Sumner Company, and Rigbetti assigned their claim to the plaintiff Mills, and the matter came on for trial before me without a jury at Hamilton on 6th March, 1907. After the evidence of Mills had been taken, it seemed to me, for reasons appearing in the report, 9 O. W. R. 421, that the action could not proceed as to the claims other than that for the work done by Mills himself, but I allowed an amendment to be made adding the Fuller Claflin Company, the Roeser & Sumner Company, and Rigbetti as parties plaintiffs. This was done.

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An order was made by the local Judge against those so added, directing them to give security for costs. Upon appeal to me at Hamilton, I set aside this order, and I now direct that the costs of the motion and appeal be to the defendants in any event.

The case came on for trial upon the new record before me at Hamilton, on 30th April, 1907, when certain evidence was given. The narrative set out above I find to be the fact, as well as what follows, and, so far as the evidence adduced is not consistent therewith, I decline to believe it.

The increase in cost was occasioned by changes, all of them to the knowledge and with the acquiescence and at the request of Louden, and most of them also of the defendant himself — in this latter category appearing the change whereby all his land became covered. These changes did not require to be ordered in writing, as article V. does not refer to changes which are agreed upon between owner and architect, but it is intended to govern the relations between owner and contractors. Of course the Court must give full effect to such a provision, if applicable, but nothing more than its full and legitimate effect will be given to it—the Court will not extend its application. I think that the extra work cannot be said to have been done under the contract, but entirely outside the contract, as was the case in Dominion Paving, &c., Co. v. City of Toronto, ante 38, and if it were necessary to have a writing from the owner, so far at least as the change occasioned by taking in the 6 feet is concerned, the telegrams and letter of Louden, the agent, are sufficient. I do not think, however, that that alone would entitle the architect to an increased remuneration if it could be considered that the architect was bound to do all that might ultimately be found necessary to complete the theatre for the remuneration stated in the contract. The remuneration of $2,500 is not on a percentage basis, but is "for the work to be performed by the builder under this contract." And an attentive reading will, I think, shew that the parties carefully provided throughout that the contract should cover only "the work indicated by the preliminary drawings and descriptive specifications." It does not very clearly appear in the evidence what extra work was needed on the part of "the builder." From the best judgment I can form on the somewhat fragmentary evidence, I think there was considerable extra work. The builder should be entitled to a reasonable sum for such ser-

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vices rendered by them quite outside of the contract, and I allow the sum of $500 for such extra services. If either party be dissatisfied with the amount awarded, he may have a reference to the Master at Hamilton, at his peril as to costs—the Master on such a reference to find the amount of extra work occasioned by changes of which the defendant or Louden was cognizant, and either expressly or by implication approved, and what reasonable sum should be allowed for such extra work.

As to the amount unpaid of the $2,500, it appears that all was paid in reality except $50, but that $100 was paid to one Okel, and $400 to Shuttleworth, under the following circumstances. Rigbetti, having performed part of his contract, asked for some money; Louden refused to pay him, but said he would pay $400 to Shuttleworth, and Shuttleworth might, if he pleased, pay it to Rigbetti. This was done. The contention now of the defendant is that Rigbetti had no contract with him, and that this sum was a payment to Claflin. I hold that the contract of Rigbetti was with the defendant, and that he should have paid Rigbetti. With the knowledge and consent of the defendant's agent, Claflin's agent paid Rigbetti $400, which the defendant himself should have paid. The defendant has been credited with this sum by Rigbetti, and now the Claflin Company are entitled to be repaid thus sum as money paid, or Rigbetti must repay the $400 to Claflin, and be paid $1,000 by the defendant. As regards the $100 payment to Okel, this was approved by Claflin's agent. The Claflin Company then are entitled to receive from the plaintiff:—

On account of contract (balance)	$ 50 00
For money paid Rigbetti	400 00
For extra work	500 00
	$950 00

Rigbetti is entitled to receive the balance of $1,000, less $400 paid.= $600.

The Roeser & Sumner Company are entitled to receive the sum of $218.50.

Mills the sum of	28 52
Paid into Court and a further sum agreed upon....	16 76
In all	45 28

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Each is entitled to interest at 5 per cent. from the day of the teste of the writ.

The plaintiffs are entitled to the general costs of the action; as to the costs of 6th March, 1907, the plaintiffs will pay those to the defendant except the witness fees, if any, of the plaintiff Mills—these to be set off against the costs to which the plaintiffs are entitled. No costs of the amendment or the new record.

If either party elects to take the reference to the Master referred to, he must declare his election within 10 days from this day—until which time all proceedings are stayed.

MAY 3RD, 1907.

DIVISIONAL COURT.

RE KEMP, JOHNSON v. ANCIENT ORDER OF UNITED WORKMEN.

Life Insurance—Benefit Certificate—Designation in Favour of Wife and Children—Preferred Beneficiaries—Change by Assured—Designation in Favour of one of same Class who is also a Creditor — Intention to Exonerate Estate from Debt—Invalidity of Appointment—Trust—Sinister Exercise of Power.

Appeal by the administrator of the estate of the widow of Charles B. Kemp, and by the children of Charles B. Kemp other than Corinne Johnson, from an order of FALCONBRIDGE, C.J., declaring Corinne Johnson entitled to the moneys in Court, being the proceeds of a beneficiary certificate for $2,000 issued by the Ancient Order of United Workmen to Charles B. Kemp.

The original certificate, bearing date 6th August, 1881, declared that Charles B. Kemp was "entitled to all rights and privileges of membership in the Ancient Order of United Workmen, and to participate in the beneficiary fund to the amount of $2,000, which sum shall at his death be paid to his wife and children." It also declared that "this certificate is issued upon the express condition that said Charles B. Kemp shall in every particular, while a member of said Order, comply with all the laws, rules, and requirements thereof."

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The constitution of the Order provided that where a member desired and was entitled to change his beneficiary, he might do so by filling out the blank form on the back of his certificate authorizing the change, and otherwise complying with certain formalities; and under this provision Charles B. Kemp did on 13th February, 1901, fill up this blank, making it read as follows: "I, Charles B. Kemp, to whom the within certificate was issued, do hereby revoke my former direction as to the payment of the beneficiary fund due at my death, and now authorize and direct such payment to be made to Mrs. Johnson, bearing relationship to myself of daughter."

On 6th March, 1901, a new certificate was issued wherein Mrs. Corinne Johnson was made the beneficiary, and under this she claimed the whole fund of $2,000.

It appeared that in 1889 Charles B. Kemp became indebted to his daughter Corinne Johnson in the sum of $3,000, the whole or nearly the whole of which remained unpaid up to the time of his death; that shortly before the change she had discussed with her father the matter of such indebtedness; that on 13th February, 1901, he directed the certificate to be changed; that the change was completed on 6th March, 1901; and that on 20th March, 1901, he informed her of the change and delivered to her the certificate, and also an instrument executed by him, dated 20th March, 1901, stating that, in consideration of his indebtedness to her and of her acceptance from him, in satisfaction of such indebtedness, and releasing him from the same, of the beneficiary certificate for $2,000 in her favour, he promised and agreed to pay all dues in respect thereof and to do all other acts necessary to keep the certificate valid till his decease, to the end that she should receive the full benefit of the certificate and of the moneys secured thereby.

Corinne Johnson did not ask for the change; it was made without her knowledge; and she first learned of it on 20th March, when her father executed and delivered to her the instrument of that date, which she then accepted from him together with the beneficiary certificate, both of which documents she retained in her custody until her father's death.

The appeal was heard by MULOCK, C.J., ANGLIN, J., MAGEE, J.

T. Hislop, for the appellants.

F. W. Carey, for Corinne Johnson.

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MULOCK, C.J. (after setting out the facts as above):—Corinne Johnson having raised no objection to the terms set forth in the instrument of 20th March, but, on the contrary, having accepted it from her father after its execution by him in her presence for delivery to her, the only inference of which her conduct is susceptible is that she gave her father to understand that she agreed to its terms, one of which was that she accepted from him the beneficiary certificate in satisfaction of his indebtedness to her. Thus she was a party to the arrangement whereby the appointment of the fund in question should relieve him and his estate from her claim. This fund, by sub-sec. 1 of sec. 159 of the Ontario Insurance Act, is a trust fund in favour of the preferred beneficiaries, and that sub-section declares that "so long as any object of the trust remains, the money payable under the contract shall not be subject to the control of the assured or of his or her creditors, or form part of his or her estate, when the sum secured by the contract becomes payable." Sub-section 1 of sec. 160 empowers the assured to vary the apportionment of the fund amongst the preferred beneficiaries, and sub-sec. 2 expressly restricts such apportionment to one or more of the persons included in the class of preferred beneficiaries, and the proviso to sub-sec. 2 declares "that the assured shall not, by virtue of the preceding sub-section, be authorized to divert the said moneys or benefits from all the said class to a person not of the said class or to the assured himself or to his estate."

The original certificate declared that the fund should be for the benefit of the wife and children, and it therefore became a trust fund in favour of them, or some or one of them, so long as any of them remained. It was not competent for the assured to divert the fund for the benefit of any object not within the class of preferred beneficiaries, yet that is, in substance, what he sought to accomplish; for, whilst nominally the appointment was to his daughter, one of the class, in reality it was for his own benefit. The transaction in its real nature being a payment of a debt of the assured, it comes within the prohibition of sub-sec. 1 of sec. 159.

In view of the arrangement under which Corinne Johnson accepted the beneficiary certificate, she could not take the benefit of it and also collect her claim from her father's estate. This fund (if the apportionment is valid), in re-

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lieving the estate of the debt, would in fact form part of the father's estate, which the statute forbids.

In enacting the sub-sections in question, the legislature clearly intended to secure the fund for the benefit of the preferred beneficiaries, some or one of them, and that it should not be lawful for the assured by any method to defeat that object. If the present indirect method were to be upheld, then the safeguards which the legislature intended to throw around policies for the benefit of wives and children, as against creditors of the assured, would be gone, and in every case there would be a possibility of pressure from creditors on the assured, and of his influence on some one of the beneficiaries, whereby the preferred beneficiaries would lose the benefit of the insurance money.

For these reasons I am of opinion that the arrangement with Corinne Johnson whereby she accepted the beneficiary certificate in satisfaction of her claim against the assured was contrary to the statute, and that therefore the appointment to her was null and void.

Further, I am of opinion that apart from the statute the appointment to Corinne Johnson is void. The statute gives a father the power of appointment over the fund in question, but he is not beneficially interested in it, and is bound to exercise the power of appointment according to the well settled principles applicable to the exercise of powers by donees thereof.

An appointor when exercising the power must act in perfect good faith, with the honest desire only of promoting the real object of the power and nothing beyond it. . . .

[Reference to Portland (Duke of) v. Topham, 11 H. L. C. 32; Palmer v. Wheeler, 2 B. & B. 29; Reid v. Reid, 25 Beav. 469; In re Marsden's Trusts, 4 Drew. 594; Wellesley v. Morington, 2 K. & J. 143.]

In the present case I think that the proper conclusion from the facts is, that Corinne Johnson having called her father's attention to his indebtedness to her, he changed the beneficiary certificate in her favour, in order thereby to relieve his estate, and he made this intention clear by the document of 20th March; that having this ulterior object in view at the time of exercising the power, he did not exercise it for the real and only purpose of carrying out the object of the power, but in order to accomplish some ulterior purpose. Therefore, the appointment to Corinne Johnson is null and void, and the rights of the parties entitled

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to share in the fund must be determined in accordance with the terms of the beneficiary certificate of 6th August, 1881.

For these reasons, I think this appeal should be allowed, but without costs.

The fund being in Court, an order should go for its distribution among the parties entitled. The consideration for which Corinne Johnson agreed to release her claim against her father's estate having failed, her agreement to release also fails, and the order should contain a clause relieving her from the agreement to release.

ANGLIN, J., gave reasons in writing for the same conclusion.

MAGEE, J., also concurred.

CARTWRIGHT, MASTER. MAY 4TH, 1907.

CHAMBERS.

DE LUCA v. MEAD-MORRISON MANUFACTURING CO.

Writ of Summons—Service out of Jurisdiction of Writ for Service in Ontario—Setting aside—Costs.

Motion by defendants to set aside service upon them of the writ of summons, the order authorizing service, and all other proceedings.

T. L. Monahan, for defendants.

C. A. Moss, for plaintiff.

THE MASTER:—The defendants are a foreign corporation, in whose service it is said that one Joseph Bazai was killed through the negligence of defendants' servants. Plaintiff is the administrator of the estate of the deceased. A writ of summons was issued on 12th December last for service in Ontario, at which time it could have been served on defendants' president, who was then in Port Arthur. Negotiations, however, took place looking to a settlement, and the writ was not served. When the negotiations fell through, there was no representative in Ontario on whom service could be made. Thereupon plaintiff on 26th March

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writ already issued, together with statement of claim, on defendants at Chicago.

No concurrent writ for service out of the jurisdiction was issued, and therefore this was a nullity, as shewn in Piggott v. French, 8 O. W. R. 679, 783. As was pointed out by Anglin, J., at p. 784, there could not have been any waiver other than by appearance. It would therefore seem that Rule 358 has no application.

The order for service and all proceedings taken thereunder must be set aside, but, in the circumstances, without costs.

Plaintiff still has a reasonable time to proceed regularly and get to trial at the assizes beginning on 17th June. The local Judge would probably feel no difficulty in limiting the time for appearance and delivery of the statement of defence to the minimum period of 18 days, as the whole facts have already been brought to the knowledge of defendants and of their solicitors.

If defendants prefer to allow the service to stand, and so elect within 4 days, and will undertake to appear and defend not later than 25th May, then I will make such an order with costs to them in any event.

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THE

ONTARIO WEEKLY REPORTER

(To and Including May 11th, 1907).

VOL. IX. TORONTO, MAY 16, 1907. No. 18

BRITTON, J. MAY 6TH, 1907.

TRIAL.

DODDS v. CONSUMERS GAS CO.

MILLS v. CONSUMERS GAS CO.

HEARD v. CONSUMERS GAS CO.

WEBSTER v. CONSUMERS GAS CO.

Master and Servant—Injury to Servant—Negligence of Master—Dangerous Work—Findings of Jury—Liability at Common Law—Workmen's Compensation Act.

Actions for damages for injuries sustained by plaintiffs while in the employment of defendants, owing to the negligence of defendants as alleged.

R. U. McPherson, for plaintiff.

E. F. B. Johnston, K.C., and R. H. Greer, for defendants.

BRITTON, J.:—The plaintiffs in these actions were workmen in the employ of the defendants at their gas works in Toronto. The defendants use what is called the "oxide" method of purifying the gas manufactured by them. This requires the use of large purifying tanks, through which the gas entering at the bottom forces its way, or is forced upward through certain trays until it reaches the top or lid, and then passes down through an exit tube and out in the next purifier, or to be further dealt with. This "oxide method" is based upon "the property of the hydrated oxide of iron to

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decompose sulphuretted hydrogen, a portion of the sulphur forming a sulphide with the iron."

When a sufficient quantity of gas has passed through this mixture in the tank, the tank is opened—either for the purpose of exposing the mixture to the air, so as to fit it for additional work, or for removing the mixture, and putting in a fresh supply.

On 8th September, 1906, the plaintiffs with other workmen, and all under the direction of a Mr. Wright, were at work in and about the lifting of the large cover of one of these purifying tanks. When the cover or lid was raised 3 or 4 inches, the contents of the tank took fire, flame burst out, enveloping the plaintiffs and other workmen, and the plaintiffs were all seriously injured.

The four actions were, pursuant to an order, tried together. Questions which I thought covered the whole matter were submitted to the jury, and these were answered. Damages were assessed in favour of Dodds for $3,000, Mills for $750, Heard for $500, and Webster for $2,000.

There was evidence which could not properly be withdrawn from the jury, and upon which the jury could find as they have done. Then, do the facts, as found by the jury, establish liability (a) at common law, or (b) under the Workmen's Compensation for Injuries Act?

After the verdict and upon the motion for judgment a great many cases were cited by counsel for defendants which are applicable only upon the argument that the verdict is against the evidence and the weight of evidence. With that question I have now no power to deal. My present consideration is as to whether or not there was any evidence to go to the jury upon the questions submitted, and do the answers to these questions shew any, and, if any, what liability?

As I have said, there was, in my opinion, evidence proper to submit and with which the jury could deal.

As to common law liability, if no other case cited than Traplin v. Canada Woollen Mills, 35 S. C. R. 424, I would be bound by that case, and upon the answers given in these cases, to direct judgment for the plaintiffs. If these cases go further, the whole matter can be threshed out upon the defendants' motion. The Traplin case perhaps as fully as any other deals with and points out the distinction between the employer's liability to his servant for injuries occasioned

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by carelessness of a fellow workman, and the liability arising out of the employer's duty to provide and maintain suitable, proper, and reasonably safe machinery and appliances for carrying on his business. Many cases are there cited and considered.

The tank, with its contents, was dangerous. The danger of explosion or of fire coming from it was something the defendants ought to have known, and some means should have been adopted for the protection of the men, who were ignorant of the danger. The system was not a safe system. It is stated in Smith v. Baker, [1891] A. C. 339, "that a negligent system, or a negligent mode of using perfectly sound machines, may make the employer liable quite apart from any of the provisions of the Employers Liability Act." . . .

This was a dangerous plant. Its danger was not known to the plaintiffs—perhaps the danger was not wholly known or realized by the overseer, Wright, who, as was admitted by the defendants, had charge of the work of lifting the cover or lid; but it was known to be dangerous; the work was a work of great hazard, and it was the duty of defendants, a duty owed to their workmen, to see to what extent an explosion or fire could be prevented, and in case either happened to provide protection to the men from injury as far as possible. . . .

[Reference to Smith v. Baker, [1891] A. C. at p. 353; Weems v. Mathieson, 4 Macq. 226.]

How very dangerous this work was, and how such an accident as actually occurred was easily possible, was shewn by the evidence of Prof. Laing. In the process of purifying the gas, the hydrated oxide of iron and the sulphuretted hydrogen form a new compound, viz., sulphide of iron. While this is going on, free sulphur, more or less, is precipitated through the mass. The admission of air causes the sulphide to heat very rapidly and to such a degree as to set fire to gas remaining in the purifying tank.

To supply proper plant for such work and to direct the operation of purifying gas in this way requires great knowledge and skill: see Royal Electric Co. v. Hévé, 32 S. C. R. 462.

Neither Mr. Wright, the person in superintendence of the particular work at the time of the accident, nor Mr. Sinclair, the general superintendent, was called at the trial.

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The counsel on both sides have cited a great many cases, many of which I have read with care, but it is not necessary that I should now refer to them.

This is not the case of a dangerous machine at which a person was employed to work, a machine "obviously dangerous," but one as to which a workman would know, or ought to know, as much as the master. That kind of a case was Rudd v. Bell, 13 O. R. 47.

The case of Schwoob v. Michigan Central R. R. Co., 9 O. L. R. 86, 5 O. W. R. 157, is not against the plaintiffs upon the facts as now presented. See also Allan v. Sawyer-Massey Co., 12 O. L. R. 282, 8 O. W. R. 269; McArthur v. Dominion Cartridge Co., [1905] A. C. 72.

The questions and the answers upon the evidence bring up the whole matter as to liability.

It is not necessary for me to deal here with the question of liability under the Workmen's Compensation for Injuries Act. If there is liability at common law, a fortiori there is liability under the Act, upon the findings by the jury, and it is only a question of reduction of damages as to Dodds and Webster to $1,731.60 each, that being the amount of 3 years' wages, 156 weeks at $11.10 a week.

Judgment for plaintiff Dodds for $3,000, plaintiff Mills for $750, plaintiff Heard for $500, plaintiff Webster for $2,000, with costs.

BOYD, C. MAY 6TH, 1907.

TRIAL.

COPELAND-CHATTERSON CO. v. LYMAN BROS. CO.

Patent for Invention—Sale of Patented Article—Condition Restricting Use—Sale Subject to—Evidence—Waiver of Condition—Issue of Fact—Finding in Favour of Condition—Injunction—Costs—Attacking Validity of Patent—Status of Licensees—Novelty—Utility—Onus—Invention—Combination of Old Elements—Forfeiture for Refusal to Sell—Failure to Establish Refusal—Patent Act—"Reasonable Price"—Restriction as Part of Price.

Action for an injunction to restrain the defendants from using ledger binders bought from plaintiffs otherwise than with sheets furnished by plaintiffs.

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W. E. Raney, for plaintiffs.

G. H. Kilmer, for defendants.

BOYD, C.:—Plaintiffs' cause of action arises in respect of the sale of 8 ledger binders (made pursuant to a patent held by plaintiffs), which, it is alleged, were purchased by defendants subject to a condition that they should be used only in connection with sheets furnished by plaintiffs. Defendants deny having purchased subject to any such restriction, and also aver that if the purchase was subject to any such condition the same was waived and withdrawn by defendants. Seven of the ledger binders were purchased in October, 1902, and the 8th in December, 1904, and the release set up was in December, 1906, pending the action, which was begun on 4th April, 1906.

I find upon the evidence that the defence of release of condition has not been proved. The sole issue, then, is whether the sale of the binders was absolute or restricted in use as claimed by plaintiffs, and the question is one entirely of fact.

Negotiations for the purchase opened with a letter of 20th October, 1902, from plaintiffs to defendants, giving prices of different styles of binders, and also prices per thousand of the leaves (or sheets) to be used with the binders. The letter refers to samples submitted therewith, and the evidence for plaintiffs states that the samples had on them printed notices to the effect that all binders were to be used only with sheets supplied by plaintiffs. The samples sent cannot now be identified.

The next document in evidence is a signed order for the 7 binders, dated 24th October, 1902, of which the material parts are as follows: "The Copeland-Chatterson Co. . . . sold to the Lyman Bros. Co. . . . All binders on this order are sold and bought for use only with sheets sold by or under authority of the Copeland-Chatterson Co. . . . [Then follow specifications and prices of the binders.] The terms of sale on which this order is taken are . . . Signature: The Lyman Bros. Co., per Jas. Watt."

This order was forwarded by Hall, their agent, to the plaintiffs, and by them acknowledged in letter. 31st October, 1902, written to defendants, in which letter a duplicate of the order was sent enclosed, containing the restrictive clause.

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The binders were manufactured and delivered to defendants in January, 1903, accompanied or preceded by an invoice, dated 19th January, of the goods and price, $256.16, which had printed on its face the restrictive clause in the same words as already quoted.

Delay arose in payment because Mr. Watt, agent of defendants, wished to have a definite letter of guarantee, and this was given by plaintiffs on 7th February, 1903. It guaranteed the efficiency of the binders for 10 years, and provided for repairing free of charge. Payment of the account was made by defendants on 10th February.

The 8th binder was sold in December, 1904, on an order for ledger leaves and one binder as set forth in plaintiffs' letter to defendants dated 2nd December, 1904. This binder on its inside cover carried the restrictive condition plainly and conspicuously printed. It appears that the former 7 had plain lining without any restrictive notices, and plaintiffs say that this omission (which came to their knowledge during the action) is an extraordinary mistake which cannot be explained except by hurry in filling the order. It is said that positive instructions were given to have the binders contain this notice, as the policy of the company was to dispose of their binders subject to that condition, restricting the use as already stated.

Plaintiffs say, and it is not contradicted, that they had been selling other binders for some two years to defendants, and that all these orders had the restrictive clause, and that such was their custom in making sales generally. . .

Plaintiffs do not appear to have been aware till shortly before action that defendants were buying sheets for use in their business from the Business Systems Limited. According to the evidence, the earliest purchase of sheets from that rival concern was in February, 1906. It also appears that the Business Systems indemnified defendants in making such purchases, and have intervened in the defence of this suit.

I think the weight of evidence is clearly in favour of plaintiffs' contention. This sale was not completed, I think, until defendants were well aware that the ledgers were to be used only with sheets coming from plaintiffs. In the absence of cogent evidence to the contrary, the signing of the order of 24th October by the accredited agent of defendants would be conclusive. That order is reinforced by

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the fact that a duplicate of it was sent to defendants contemporaneously and an invoice of the goods with the restrictive clause sent soon after. Then came a delay till the guarantee was executed of a more definite character than the one referred to in the letter of 20th October, and finally, with knowledge, actual or to be imputed, of all the documents and their contents, comes the close of the deal by the payment of the price in February of the next year. There was deliberation in the transaction, and it must be taken that the mind of defendants was charged with the knowledge of the restrictive conditions before the completion of the transaction. They had opportunity to recede and refuse to purchase unless the restriction was removed, while yet the purchase was pending. No doubt they could have done so after the sale had been closed, but then they would not be bound to do. But if they prosecuted the transaction to its close, knowing from an early stage the condition on which the binders were offered by plaintiffs, it does not lie in their mouth now to repudiate one of the terms.

[Reference to Badische Anilin und Soda Fabrik v. Isler, [1906] 1 Ch. 605, 610, [1906] 2 Ch. 443; Incandescent Gas Light Co. v. Cantelo, 12 R. P. C. 262; Incandescent Gas Light Co. v. Brogden, 16 R. P. C. 179; British Mutoscope and Biograph Co. v. Homer, [1901] 1 Ch. at pp. 671, 673-4.]

My conclusion is that plaintiffs are entitled to an injunction to restrain defendants from using the ledgers otherwise than according to the limited condition, i.e., to be used only with sheets supplied by plaintiffs.

Many other important matters were raised in the pleadings and outside of the pleadings and discussed at some length. It is not needful to pass upon them, for, in my opinion, it is not open for defendants, while holding and using the patented articles under the limited license of user granted, to attack the validity of the patent. These defendants fall under the general rule of estoppel which exists as between patentee and licensee: Mills v. Carson, 9 R. P. C. 338, 345, 10 R. P. C. 9.

However, for the purpose of costs, I have considered the issues raised, and referred to the cases cited and others. Having regard to the prima facie case made by the production and proof of the patent, the onus rests on defend-

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Brown, L. R. 8 Eq. 663. There is cogent affirmative evidence of both requisites in the general evidence as to the large sales made, mounting up to many thousands of the patented articles. This, one Judge has said, is conclusive as to utility and very cogent as to novelty, unless it is contradicted: Moss v. Malings, 3 R. P. C. 373, 378; Ehrlich v. Ihlee, 5 R. P. C. 198, 205. I do not find it proved that there is an absence of invention in the combination of parts which made up the whole apparatus patented. Granted, as Mr. Riches says, that it is a combination of the mechanism displayed in the Van Pett patent with the back and cover combination set forth in the first Jones patent, issued in the United States on 8th February, 1899. Jones was the inventor of that part of the ledger binder in question, and before the year elapsed after the issue of the American patent he had incorporated that part into his combination patent issued in Canada within the year of privilege, viz., on 4th February, 1900. Besides, it has not been shewn to my satisfaction that there is any lack of invention—to use that large and flexible term—in his making this combination. I may use the language of Mr. Justice Burbidge in Griffith v. Turnbull, 7 Ex. C. R. 413: "The combination of old things to produce a better result affords evidence of invention in the fact that the idea or conception itself is new, and produces a useful result." The cases all hark back to the ruling in charging a jury which was adopted as correct by the House of Lords in Cannington v. Nuttall, L. R. 5 H. L. 205, that if the combination is new and useful the patent should be upheld, though each separate process employed in it was previously known.

A defence was largely insisted on which does not appear to be specifically pleaded on the record, and, perhaps in too great indulgence, I allowed particulars to be given and enlargement to be granted for that purpose during the trial. That is the defence of forfeiture of the patent because of refusals to sell the ledgers absolutely and unconditionally. Upon the evidence there is not that clear and trustworthy proof made which would justify this extreme penalty. The 4 instances adduced are of old standing comparatively. One is explained as an attempt to purchase, not to use the machine commercially, but to turn it over in order to assist a competitor in the business. The direct evidence is given

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by the person who complains of the refusal, and it may well be that the application was a trick and not bona fide. The other one relating to Caverhill turns out to be of no importance—an initial refusal was converted into a satisfactory sale two days afterwards, and this in 1902. The other two are in no manner proved; it is oath against oath, and I cannot give such abundant weight to the evidence of Mr. Meyers as I might to an independent witness, for he at the beginning of the litigation was in charge of this action for plaintiffs, and now he is the leading witness in the camp of defendants. . . . Hence I find these particulars not established by the proof.

I need not dwell on another matter argued as to whether "reasonable price" permits the introduction of a condition or restriction as part of the price. See sec. 37 of R. S. C. ch. 61. The contrary was held by Mr. Justice Burbidge in Copeland-Chatterson Co. v. Hatton, 10 Ex. C. R. 224, in which he was of opinion that the sale must be out and out and unconditional if the purchaser declines to accede to the proposed restrictions. No reference is made there to the opposing view enunciated by Sir John Thompson when Minister of Justice in advising the Minister of Agriculture in an appeal from the decision of Pope, Deputy Commissioner, in Royal Electric Co. v. Edison Electric Light Co., 2 Ex. C. R. 576, 608-9. The result of that part of the Attorney-General's opinion is that if a reasonable condition or limitation as to use be imposed in good faith and not in order to evade selling the patented article at a reasonable price, the patent should not be avoided. And in his view the patentee may impose limitations—insist on selling in that way—so long as he sells at a reasonable price. In this case the evidence shews that the price is far from exorbitant and is in fact reasonable. But upon the legal question arising on the construction of the Patent Act, I do not dwell except to say that, as I regard it, the point is still open for decision. For, though the view of the Judge of the Exchequer Court is so expressed, his attention was not directed, according to the report, to the language of Sir John Thompson, and his decision, though affirmed in the Supreme Court, was affirmed simply upon the ground set forth in the head-note, viz., that the sale of the binders in that a case subject to a condition that they should be used in a restricted manner, was a valid transaction, not to be

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evaded or broken by the purchaser, who had agreed to such terms: Hatton v. Copeland-Chatterson Co., 37 S. C. R. 651.

The judgment is in plaintiffs' favour granting the injunction and costs of suit.

MAY 6TH, 1907.

DIVISIONAL COURT.

REX v. CHISHOLM.

Municipal Corporations — By-law Regulating Sale of Bread — Weight of Loaf — Power of Municipality — Power of Provincial Legislature—Conviction for selling under Weight—Mens Rea—Evidence.

Motion by defendant to make absolute a rule nisi to quash his conviction for violation of by-law No. 4332 of the city of Toronto by selling bread under weight.

The motion was heard by FALCONBRIDGE, C.J., BRITTON, J., RIDDELL, J.

E. E. A. DuVernet, for defendant.

F. R. MacKelcan, for private prosecutor.

RIDDELL, J.:—. . . Mr. DuVernet contended: (1) that the subject matter of the by-law was ultra vires of the province; (2) that, if not, the province never intended to grant such extensive powers to the municipality; (3) that there was no evidence of the mens rea; and (4) that there was no evidence that the bread when sold was under weight.

Some other objections were also taken, but we are precluded from considering them by the admissions of the defendant appearing in the proceedings before the police magistrate.

1. As to the first objection we are, I think, bound by the case of Re Nasmith and City of Toronto, 2 O. R. 192. The by-law in question in that case was No. 1128. We have sent for that by-law, and, upon comparing it with by-law 4332 now in force, we find that in the sections relating to the weight of loaves to be sold, the wording is practically

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identical—there is a slight difference, indeed, the former by-law prescribing loaves of 1 lb., 1½ lbs., 2 lbs., and 4 lbs., respectively, while the present by-law prescribes loaves of 1 lb. and 3 lbs. It is obvious that this difference is immaterial. It is true that the Nasmith case decided only that the section of by-law 1128 which directed that the weight should be stamped on each loaf was intra vires—but the judgment proceeded upon the ground that it was lawful to prescribe the size of the loaves, and that a direction that the weight should be stamped thereon was within the powers given of regulating the assize of bread. At p. 194, the judgment of the Court reads: "When our legislature authorized the defendants to pass by-laws for seizing and forfeiting bread of light weight or short measurement, they must undoubtedly have intended that the defendants should have the right to prescribe what such weight or measurement should be, otherwise there would be no means of ascertaining if it were under or of full weight."

The legislation referred to by the Court is what is now and was at the time of the by-law now in force 3 Edw. VII. ch. 19, sec. 580 (11).

The power of the province does not seem to have been questioned in the Nasmith case; but the holding that the province had given this power to the municipality involved the right of the province so to do. We are bound by this judgment, and the first point fails.

2. And the passage I have quoted from the judgment covers also the second point. It is argued that the punishment imposed for violation of the provisions of this by-law is beyond the power of the province and of the municipality. That is also covered by the same case, p. 196: "If the section as to stamping were omitted from the by-law, the applicant's complaint would be just the same. He would be liable to fine if the loaf was not of the prescribed weight."

The Municipal Act has this provision, sec. 702 (b): "By-laws may be passed by the councils of.....cities .....for inflicting reasonable fines and penalties not exceeding $50 exclusive of costs for breach of any of the by-laws of the corporation." If the municipality has the power to pass the substantive parts of the by-law, it plainly has the power to provide a penalty for its transgression.

3. I do not think that mens rea is essential. This must depend upon the wording and the object of the enactment.

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There can be no doubt that it is competent for any legislative authority to legislate in a matter within its jurisdiction in such a way as to make the existence of any state of mind of the perpetrator immaterial: Bank of New South Wales v. Piper, [1897] A. C. 383, at p. 389.

In the present enactment we have no such words as "knowingly," "wilfully," &c. This being the case, such decisions as Regina v. Prince, 2 C. C. R. 154, Roberts v. Egerton, L. R. 9 Q. B. 494, Regina v. Bishop, 5 Q. B. D. 259, Sherras v. De Rutzen, [1895] 1 Q. B. 918, shew that there are many cases in which there is no necessity of mens rea. In the last named report Mr. Justice Wright, at p. 922, gives instances in which this is the case, amongst them "a class of cases which are not criminal in any real sense but are acts which in the public interest are prohibited under a penalty." The present comes within that category.

4. We held in Rex v. McArthur, 8 O. W. R. 654, that if there be any evidence upon which the magistrate could convict, we could not weigh the evidence and could not interfere with the conviction. There is ample evidence, I think, upon which the magistrate could act.

The inspector of bread for the city swore that he seized certain loaves of bread and weighed them, finding them from 1¼ to 12 ounces short in weight. He says that he weighs only bread of the day's baking and never weighs stale bread. The defendant admitted that this bread was "his bread seized by Inspector Awde, which had been sold by defendant." Considerable evidence is given as to bread losing weight—though what the inspector says is "After bread gets stale, it lessens in weight." I cannot say that there is no evidence upon which the magistrate could act.

The motion should be dismissed with costs.

BRITTON, J., gave reasons in writing for the same conclusion.

FALCONBRIDGE, C.J., concurred.

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MAY 6TH, 1907.

DIVISIONAL COURT.

CAMPBELL v. CROIL.

Money in Court—Ownership of—Partnership—Judgment Creditors—Stop Orders—Creditors' Relief Act—Payment out to Sheriff for Distribution.

Appeal by John H. Croil, administrator of estate of Elizabeth J. Croil, from order of CLUTE, J., ante 772, affirming order of Master in Chambers, 8 O. W. R. 67.

G. A. Stiles, Cornwall, for the appellant.

W. E. Middleton, for the respondent.

THE COURT (MEREDITH, C.J., TEETZEL, J., MABEE, J.), dismissed the appeal with costs.

MAY 6TH, 1907.

DIVISIONAL COURT.

RE HUGHES, MAHAFFY v. NICHOLSON.

Pleading—Statement of Defence—Motion to Strike out Part —Action to Establish Will—Setting up Prior Will.

Appeal by plaintiff from order of RIDDELL, J., ante 652, allowing an appeal from order of Master in Chambers, ante 506, and restoring the part of the defence struck out by the Master's order.

Grayson Smith, for plaintiff.

W. E. Middleton, for defendants.

THE COURT (MEREDITH, C.J., TEETZEL, J., MABEE, J.), dismissed the appeal with costs to defendants in any event.

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MAY 6TH, 1907.

DIVISIONAL COURT.

MORRIS v. CAIRNCROSS.

Waste—Lease for Years by Tenant for Life—Settled Estates Act—Rights of Reversioners on Death of Life Tenant—"Without Impeachment of Waste"—Repair of Buildings—Short Forms Act—Permissive Waste—Wear and Tear.

Appeal by plaintiffs from judgment of BOYD, C., 7 O. W. R. 834, dismissing the action without costs.

W. E. Raney and A. Mills, for plaintiffs.

C. A. Moss, for defendant.

The judgment of the Court (MEREDITH, C.J., MACMAHON, J., TEETZEL, J.), was delivered by

MEREDITH, C.J.:—In their statement of claim plaintiffs allege that Mary Gallagher, who was the owner of the lands in question and other lands, died in 1870, having first made her will whereby she devised them to her son Robert Atkinson Gallagher for life; that pursuant to the will the son "duly entered into possession" of the lands in question; that he and the trustee of the will, John Oliver, on 1st October, 1895, assumed to make a lease of these lands to defendant for a term of 21 years from that date, at an annual rental of $120; that plaintiff Agnes May Morris was then an infant; that the son died on 6th February, 1905, and that on his death plaintiffs, as heirs-at-law of the testatrix, became entitled to an estate in fee in the lands; that the son and Oliver had no power to make a lease of the lands for a larger term than the life of the son; "that the lease was not made in pursuance of or in conformity with the requirements of the Settled Estates Act, in that the said lease is not an ordinary lease, as contemplated by the said Act, but is in effect a building lease, and in that the said lease was made without impeachment of waste, and in that the rent reserved by the said lease was not the best rent that could have been reasonably obtained therefor, but was an inadequate and insufficient rental;"

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that, even if made in conformity with the provisions of the Settled Estates Act, the lease is not good or binding on plaintiffs; that defendant is in possession of the lands, and has excluded plaintiffs from them; "that upon the death of the life tenant the plaintiffs repudiated the said lease and demanded possession from the defendant" of the lands, and that he refused to deliver possession to plaintiffs.

The claim is for: (1) a declaration that the lease is void and not binding on plaintiffs; (2) a declaration that defendant has excluded plaintiffs from possession of the land; (3) mesne profits or damages for the use and occupation of the lands by defendant since 6th February, 1905; (4) possession of the lands; (5) costs; and (6) further and other relief.

It was argued by counsel for plaintiffs that Robert A. Gallagher was not a person entitled under the Settled Estates Act to exercise the power of leasing conferred by sub-sec. 1 of sec. 42, and that we ought to follow the decision of the Master of the Rolls (Jessel) in Taylor v. Taylor, L. R. 20 Eq. 298, which, it was urged, is a conclusive authority in favour of plaintiffs.

This objection was not taken before the Chancellor, nor is it raised upon the pleadings; on the contrary, in their statement of claim plaintiffs admit that Robert A. Gallagher was, under the will of the testatrix, tenant for life. On this statement of the pleadings as to the estate of Robert A. Gallagher, there can be no question that he was a person entitled to exercise the power of leasing conferred by sec. 42, and I do not think that at this stage of the proceedings, even if an application to amend had been made, and none was made, plaintiffs should be permitted to amend by withdrawing that admission. . . .

[Taylor v. Taylor, L. R. 20 Eq. 298, 1 Ch. D. 426, 3 Ch. D. 145, distinguished.]

In a subsequent case which arose after the English Settled Land Act, 1882, 45 & 46 Vict. ch. 38, was passed (In re Pocock and Prankerd's Contract, [1896] 1 Ch. 302) counsel arguendo said, p. 304, that cl. ix. of sub-sec. 1 of sec. 58 of that Act was "intended to get rid of the doubt suggested by Taylor v. Taylor." . . .

This provision has not been embodied in the legislation of this province, but that circumstance does not, I think, warrant the inference that the legislature in enacting the Settled Estates Act intended that persons to whom the con-

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ditions mentioned in cl. ix. . . apply were not intended to be included among the persons who by sec. 42 of our Act are entitled to exercise the power of leasing conferred by that section.

The next objection relied on by plaintiffs was that the lease was not one authorized by the Act, because, as was contended, the rent reserved by it was not the best rent that could be reasonably obtained, and the demise was made without impeachment of waste.

I entirely agree with the Chancellor that "the great preponderance of evidence" is to the effect that "the rent reserved was the best that could have been reasonably obtained in 1895." . . .

[Reference to Doe d. Lawton v. Radcliffe, 10 East 278.]

It was further argued on this branch of the case that the lease was a building lease, and therefore not authorized by sec. 42. This contention was based upon a provision by which the lessee covenanted to make certain repairs to the demised premises. I am unable to agree with the contention that the presence of this covenant in the lease renders it invalid. According to the evidence, when the lease was made the building was in a very bad state of repair, and the proper inference is, I think, that had the repairs not been made or provided for, the premises could not have been rented for a term of 21 years at the rent reserved by the lease, if indeed they would not soon, by the effect of age upon the building, have had practically no rental value; and for the dilapidated condition of the building there was no evidence to shew that Robert A. Gallagher was responsible, even if he was answerable for permissive waste.

The other ground of objection on this branch of the case—that the demise is without impeachment of waste—is based upon the proposition that the covenants to repair and to repair according to notice are qualified by the exceptions in the covenant to leave the premises in good repair, namely, "reasonable wear and tear and damage by fire or tempest," and that, being so qualified, the effect of them is that the lessee is freed from liability for waste, for which, as was contended, both voluntary and permissive, a tenant for years is answerable.

The lease is made in pursuance of the Act respecting Short form of Leases, which was then ch. 106 of R. S. O. 1887. It contains on the part of the lessee covenants to re-

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pair and to repair according to notice, according to the statutory short forms 3 and 6, and a covenant on his part to leave the premises in good repair, according to the statutory short form 8, with the words added to the last of these covenants "reasonable wear and tear and damage by fire and tempest only excepted," and the effect of this departure from the statutory form is to bring within the exception "damage by tempest," in addition to the two subjects of exception which are named in the long form 8.

The Chancellor was of opinion that the covenants to repair and to repair after notice were not qualified by the exceptions included in and engrafted on the statutory covenant to leave the premises in good repair. He distinguished Davies v. Davies, 38 Ch. D. 499. . . .

Emmett v. Quinn, 7 A. R. 306, not cited to the Chancellor, is, however, an express decision that statutory covenants 3 and 6 are qualified by the exception contained in statutory covenant 8. . . .

I refer also to the observations of my brother Magee as to the effect of Emmett v. Quinn, in Delamatter v. Brown, 9 O. L. R. 351, at pp. 361-2.

There remain to be considered two questions: (1) whether a tenant for years is answerable for permissive waste; (2) if answerable, whether the terms of the lease are such as to relieve defendant from any liability which otherwise he would be under for permissive waste.

Had it been possible to do so, I would willingly have followed the course taken by the Chancellor in Patterson v. Central Canada Loan and Savings Co., 29 O. R. 134, and have refrained from "delving into the ancient law" as to the liability of a tenant for years for permissive waste. I am not, however, at liberty to do so, because in the case at bar it is necessary for the Court, for the solution of the questions raised, to determine whether such a liability exists, and, if it does, the nature and extent of it. . . .

[Reference to Yellowly v. Gower, 11 Ex. 274; Gibson v. Wells, 1 N. R. 290; Herne v. Benbow, 4 Taunt. 764; Jones v. Hill, 7 Taunt. 392; The Countess of Shrewsbury's Case, 5 Co. 13b; S. C., sub. nom. Countess of Salop v. Crompton, Cro. Eliz. 777, 784.]

That the case of a tenant at will is not within the statutes is clear. The Statute of Marlbridge (1267), 52 Hen. III.

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ch. 23, sec. 2, forbade fermors (firmarii) during their terms to make waste without license to do so, and extended only to those who held for life or for a term of years: 2 Inst. 145; and the Statute of Gloucester (1278), 6 Edw. I. ch. 5, extended the right to the writ of waste, so that it would lie "against him that holdeth by law of England or otherwise for term of life or for term of years or a woman in dower."

Other reasons why the writ did not lie against a tenant at will are given in Smith's Landlord and Tenant, 2nd ed., pp. 20, 217 et seq. . . .

[Reference to Woodhouse v. Walker, 5 Q. B. D. 404; Davies v. Davies, 38 Ch. D. 499; Barnes v. Dowling, 44 L. T. N. S. 809; In re Cartwright, 41 Ch. D. 532.]

I am, with great respect, of opinion that, even if In re Cartwright was well decided, we ought to follow Yellowly v. Gower, followed as it was by Kekewich, J., in Davies v. Davies, unless the Judicature Act makes it necessary to follow the rule in equity, which undoubtedly was not to interpose its aid in the case of permissive waste.

This rule of equity was not based upon any different view as to the legal liability from that entertained by courts of common law, and I do not find anywhere any clear statement of the reason for its adoption. . . .

[Reference to Lord Castlemain v. Lord Craven, 22 Vin. Abr. 523; Wood v. Gaynon, Ambler 395; Lansdowne v. Lansdowne, 1 J. & W. 822; Powys v. Blagrave, 2 De G. M. & G. 448; Warren v. Ruddall, Ex p. Godfrey, 1 J. & H. 1, 13.]

The rule probably had its origin in the difficulty which courts of equity found in enforcing by their process the performance of the tenant's duty, and, in the absence of jurisdiction, to give relief by mandatory injunction, that jurisdiction being strictly confined to cases where the remedy by damages was inadequate for the purposes of justice, and the restoring of things to their former condition was the only remedy which would meet the requirements of the case: Kerr on Injunctions, 4th ed., p. 31. . . .

[Reference to Higginbotham v. Higgins, 7 Ch. D. 676.]

In Barnes v. Dowling, 44 L. T. N. S. 809, it was, however, held that since the Judicature Act an action for permissive waste is not maintainable. . . .

The ratio decidendi in Barnes v. Dowling is criticised by the writer of an able article on Permissive Waste in the

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Solicitors Journal of 5th October, 1889, p. 744. The writer points out that the liability of a tenant for life, who has the legal estate vested in him, "depends upon the statute and is not a mere rule of the common law," and expresses the opinion that the provision of the Judicature Act upon which the Court proceeded cannot for that reason alter the liability of such a tenant for life, and a similar view is taken by Mr. C. B. Labatt in an article in 37 C. L. J., pp. 533-4.

I entirely agree with this view, even if it be that the rule in equity to which I have referred depended upon a different view being taken in courts of equity of the effect of the statutes from that which was entertained by the common law courts. . . .

[Reference to Harrison v. Duke of Rutland, [1893] 1 Q. B. 142.]

The most that can be said as to the course of courts of equity in regard to claims for permissive waste is that they did not actively interfere where the estates were legal, but left the claimant to his remedy at law, and that they did not interfere where the estates were equitable, and I see in this course nothing that involves any conflict or variance between the rules of equity and the rules of common law as to the remedy by a legal remainderman for permissive waste by a legal tenant for life or for years. . . .

[Reference to Bewes on the Law of Waste (1894), pp. 216, 217.]

If the question were as to the liability of a tenant for life, we should be bound by Patterson v. Central Canada Loan and Savings Co., 29 O. R. 134, to hold that such a tenant is not liable. The effect of that decision and of my conclusion in this case leads to the illogical result, so far as a decision of a Divisional Court can be said to settle the law, that though by the statutes both classes of tenants are put on the same footing as to waste, tenants for years are liable for permissive waste, but tenants for life are not; and, were it not for that consideration, I should have refrained from adding anything further on this branch of the case. . . .

[Reference to In re Cartwright, 41 Ch. D. 532; In re Freeman, Dimond v. Newburn, [1898] 1 Ch. 28, 32; In re Parry and Hopkin, [1900] 1 Ch. 160; 5 Law Quarterly Review, p. 449; Smith's Lectures on the Law of Landlord and Tenant, 2nd ed., p. 266; Bewes on the Law of Waste, pp. 211-216; Moore, p. 62, case 173 (6 Eliz.); Corbet v. Stone-

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house, 2 Rolle Abr. 816-7 (9 Car.); Stickleborne v. Hatchman, Owen, 43 (28 Eliz.); Rastell's Entries (1670); Ferguson v. ——, 2 Esp. 589; Horsfall v. Mather, Holt N. P. 7; Anworth v. Johnson, 5 C. & P. 239; Torriano v. Young, 6 C. & P. 8; Leach v. Thomas, 7 C. & P. 327; In re Leigh's Estate, L. R. 6 Ch. 887, 892, 893; Sauer v. Bilton, 7 Ch. D. 815; Manchester Bonded Warehouse Co. v. Carr, 5 C. P. D. 507; Beale's Legal Interpretation, pp. 169-170; Hughes v. Sullivan, Hayes & Jones, Appx., 44, 2 Irish Recorder O. S. 456; White v. McCann (1851), 1 Ir. C. L. R. N. S. 205; White v. Wagner, 4 Har. & J. (Md.) 302; Stevens v. Rose, 69 Mich. 259; Wilson v. Edmond, 24 N. H. 517; Moore v. Townshend, 33 N. J. Law 284; Newbold v. Brown, 44 N. J. Law 266; Schulting v. Schulting, 41 N. J. Eq. 130; Suydam v. Jackson, 54 N. Y. 450; Danziger v. Silberthorn, 18 N. Y. Supp. 350; Long v. Fitzsimmons, 1 W. & S. (Pa.) 530, 532; Sampson v. Grogen, 21 R. I. 174, 178; Dashwood v. Magniac, [1891] 3 Ch. 306; Domat, Civil Law (Strahan) 2nd ed., vol. 1, pp. 424-5; Roby's Justinian, D. Usufructu, pp. 58-62; Roby's Roman Private Law, vol. 1, pp. 485-6; Hunter's Roman Law, 2nd ed., p. 402; Bell's Commentaries on the Law of Scotland, 6th ed., vol. 2, pp. 892-3.]

An independent inquiry into the question, fortified by the result of this examination of the principal cases in England, Ireland, and the United States, and of the opinion of text writers and commentators, leads me to the conclusion that Yellowly v. Gower was rightly decided, and that its authority has not been impugned or affected by any subsequent case, or displaced by the provisions of the Judicature Act, and I may point out that the commissioners by whom the laws of England introduced into this province by the Constitutional Act of 1792, 32 Geo. III. ch. 1, were revised and consolidated, must have reached the same conclusion as that to which I have come, for as revised the Statute of Marlbridge reads: "Lessees making or suffering waste on the demised premises without license of the lessors shall be liable for the full damage so sustained." R. S. O. 1897 ch. 330, sec. 23, and R. S. O. ch. 342, sec. 22.

There remains to be considered the question whether the modifications of the covenants in the lease to which I have referred have the effect of relieving defendant from any liability which but for them he would have been subject to for permissive waste; and I am of opinion that they

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do not. That a tenant for years is not liable to make good the results of reasonable wear and tear of the demised premises is clear upon the authorities to which reference already has been made, and the exception in respect of it does not, in my opinion, relieve from liability for decay or destruction of the premises occurring from his failure to make such small repairs as, according to the cases, it is his duty to make. Nor does the exception of damage by fire or tempest modify the obligation which but for the exception would rest upon him. The exception extends, I think, only to such damage as is the result of accident, and is not due to his negligence, though since the Imperial statute 14 Geo. III. ch. 78, sec. 86, a tenant, in the absence of contractual obligation to the contrary, is not liable for damage done by an accidental fire occurring on his premises; the statute has no application to protect him from legal liability as a consequence of his negligence: Canada Southern R. W. Co. v. Phelps, 14 S. C. R. 132; and so I think the exception to the covenant must be construed as not exempting defendant from liability for damage by fire occasioned by his negligence. In the same way, the exception as to damage by tempest, does not, I think, relieve defendant from liability should a building on the demised premises be destroyed or damaged by tempest, if its destruction or the injury to it be due primarily to his failure to make such reasonable repairs as were necessary to prevent the destruction of it or the injury to it happening in the event of a tempest, and for damages resulting from tempest alone a tenant was never apart from contract liable: Nugent v. Cuthbert, Sugden's Law of Property, p. 475.

The exceptions, no doubt, modify the contractual obligation which the defendant would have been subject to if his covenants in respect of repairing were unqualified, but that is, of course, a different matter.

If I had reached a different conclusion on this branch of the case, the provisions of R. S. O. 1897 ch. 330, sec. 24, would have applied to prevent the lease from being avoided because of the departure by the tenatn from life from the provisions of sec. 42 of the Settled Estates Act.

This enactment provides that, in the cases to which it applies, the lease, if made bona fide and the lessee have entered under it, "shall be considered in equity as a contract for a grant at the request of the lessee, his heirs,

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executors, administrators, or assigns (as the case may require), of a valid lease under such power, to the like purport and effect as such invalid lease as aforesaid, save so far as any variation may be necessary in order to comply with the terms of such power, and all persons who would have been bound by a lease lawfully granted under such power shall be bound in equity by such contract."

The result is that, in my opinion, the appeal fails and should be dismissed with costs.

BRITTON, J. MAY 7TH, 1907.

WEEKLY COURT.

CALVERLY v. LAMB.

Injunction—Interim order—Continuance—Balance of Convenience—Affidavits Sworn before Issue of Writ of Summons.

Motion by plaintiff to continue injunction.

R. L. Defries, for plaintiff.

A. E. H. Creswicke, Barrie, for defendant.

BRITTON, J.:—In the present difficulty between the plaintiff and defendant, the interests of justice will be best served, and costs and trouble will, in my opinion, be ultimately saved to the parties, by continuing the injunction down to the trial.

It appears that the affidavits upon which the injunction was obtained were sworn before the issue of the writ of summons. They were sworn at Orillia on 23rd April, and brought into Barrie on same day; the writ was on that day isued, and then application was made to the local Judge.

Under the old practice, no matter what merits plaintiff had, an injunction founded on affidavits sworn before the filing of the bill could not stand.

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WEEKLY COURT.

REX v. O'GORMAN AND OTHERS.

Criminal Law—Procedure—Motion for Change of Venue—Fair Trial.

Motion by defendants against whom a true bill for conspiracy had been found, to change venue from Toronto to London.

E. F. B. Johnston, K.C., for defendants.

G. Lynch-Staunton, K.C., for the Crown.

BRITTON, J.:—The motion is made under sec. 651 of the Criminal Code. Under that section the power of the Court or a Judge is very wide. It is to be exercised whenever it appears to the satisfaction of the Court or Judge that it is expedient to the ends of justice that the trial of the person charged should be held in some county or place other than that in which the offence is supposed to have been committed.

The accused have been indicted for offences supposed to have been committed at Toronto. The indictment was presented to the grand jury here with the consent of the presiding Judge at the assizes. If the accused have not committed these offences at Toronto, they should not be tried here, unless in pursuance of an order specially made so directing.

Upon the assumption that the accused will not be convicted unless the Crown establishes that they did in fact commit one or more of these offences at Toronto, as charged, what is there before me to shew that it is expedient to the ends of justice that the trial should not take place in Toronto?

It is said by Crankshaw in his note to this sec. 651: "The principles upon which a change of venue has hitherto been granted, and upon which the Court or Judge in the exercise of the discretionary power conferred by this section will, no doubt, in future order the place of trial to be changed, is that there is a fair and reasonable probability

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of partiality and prejudice in the district, county, or place within which the indictment would otherwise be tried."

I agree with this.

It is but faintly suggested — if suggested at all — that there is any prejudice, or likely to be any, in Toronto, against the accused, and, so far as one can see, certainly no more than in London, and it might be said that there is a probability of more "partiality and prejudice" in London than in Toronto.

The accused have made a strong case for a change of venue if balance of convenience is to be considered. No doubt they will be put to much greater expense by having to stand trial at Toronto, if it happens that as many witnesses from London are required at the trial as were called on the preliminary investigation.

This materially touches the question of a fair trial so far as the accused may be unable to bring to Toronto witnesses that they could get at London if tried there. It can not be "expedient to the ends of justice" that the accused, or any of them, should be convicted if there is evidence, material, relevant, and competent, which can be obtained to establish their innocence or to meet the case the Crown may make, and if it shall so happen that the accused really need the assistance of the Crown to have necessary and material witnesses in their behalf brought to Toronto, such assistance ought to be and no doubt will be given. There is such ample power in the trial Judge that the accused will, whatever may arise, so far as I can see, have a fair trial.

If matters outside of what occurs in Court are at all likely to influence jurors either prejudicially to the accused or otherwise, there is no more chance of that in Toronto than in London.

It was suggested by counsel for the defence that some other place than London, say St. Thomas or Woodstock, would not be objected to. It is clear to me that such a change would be of no benefit to the Crown or the accused, and would be attended with much inconvenience—to say nothing of imposing the burden of such a trial upon a county that is in no way implicated in or connected with the alleged transactions as to which a trial is to be had.

The cases referred to and others, as I read them, support the conclusion reached, that I should not make the order asked on this application. . . .

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[Reference to Rex v. Harris, 3 Burr. 1330; Regina v. Ponton (No. 2), 18 P. R. 429.]

It is a question of fair trial or not, owing to a condition likely to influence or prejudice the jury.

Motion refused.

MAY 7TH, 1907.

DIVISIONAL COURT.

RE RICKEY AND TOWNSHIP OF MARLBOROUGH.

Municipal Corporations—Local Option By-law—Publication —"Three Successive Weeks"—Municipal Act, sec. 338 —Non-compliance with—Application of Saving Clause, sec. 204—Quashing By-law.

Appeal by Rickey from order of MABEE, J., ante 563, refusing to quash a local option by-law.

F. B. Proctor, Ottawa, for appellant.

J. T. White, for the township corporation.

The judgment of the Court (MEREDITH, C.J., MACMAHON, J., TEETZEL, J.), was delivered by

TEETZEL, J.:—. . . The only ground of appeal not disallowed on the argument is that the by-law was not published in a public newspaper as required by sec. 338 of the Consolidated Municipal Act, 1903, sub-sec. 1 of which provides that the day fixed for taking the votes "shall not be less than 3 nor more than 5 weeks after the first publication of the proposed by-law." Sub-section 2 enacts as follows: "The council shall, before the final passing of the proposed by-law, publish a copy thereof in some public newspaper published either within the municipality or in the county town, or in a public newspaper published in an adjoining or neighbouring local municipality, as the council may designate by resolution; and the publication shall, for the purpose aforesaid, be continued in at least one number of such paper each week for three successive weeks.. . ." Sub-section 3 provides that a notice signed by the clerk of the council shall

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one publication in a newspaper in each of the seven-day periods.

If the word "week" is construed otherwise, it would be possible to have the publications appear in a period having only 8 clear days between the first and the last publication, where a daily paper was available. For example, the first publication on Saturday the 15th, the second on Monday the 17th, and the third on Monday the 24th.

Under the interpretation placed by me on these sub-sections, there have in this matter been two publications in the first week or seven-day period, one in the second, and none in the third, and, consequently, the statute was not complied with.

The following cases support the view I have adopted: Hall v. South Norfolk, 8 Man. L. R. 430; Re Coe and Pickering, 24 U. C. R. 439; Raunn v. Leach, 53 Minn. 84; Early v. Doe, 16 Howard 610; and Leach v. Burr, 183 U. S. 510.

Assuming that the publication was only for 2 and not for 3 successive weeks, may the by-law be sustained under the saving provisions of sec. 204?

"204. No election shall be declared invalid by reason of a non-compliance with the provisions of this Act as to the taking of the poll or the counting of the votes, or by reason of any mistake in the use of the forms contained in the schedules to this Act, or by reason of any irregularity, if it appears to the tribunal having cognizance of the question that the election was conducted in accordance with the principles laid down in this Act, and that such non-compliance, mistake, or irregularity did not affect the result of the election."

Having regard to the fact that out of 465 qualified votes in the municipality, only 345 were polled, and that the majority in favour of the by-law was only 6 beyond the requisite three-fifths, it would be difficult to say that the result of the election was not affected by the omission to publish, but I am of opinion that a publication for only 2, when the statute requires 3, successive weeks, is not such an irregularity as sec. 204 contemplates.

I adopt the view expressed by Meredith, J., in respect to this section in Cartwright v. Town of Napanee, 11 O.L.R. 69, at p. 71, 6 O.W.R. 773, 774, where he says: "The provisions of sec. 204 of the Act, made generally applicable to voting on by-laws by sec. 351, and which seem to but echo the com-

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J. A. Paterson, K.C., for defendant.

George Kerr, for plaintiffs.

THE MASTER:—The statement of claim was delivered on 26th February. Thereupon negotiations took place with a view to settlement. Nothing came of these, and on 17th April the judgment was signed under Rule 587.

The irregularity relied on is that no affidavit of default was filed at the time, though one was filed two days later, after the notice of this motion had been given. Rule 567 is silent as to the necessity of any affidavit such as is required under Rule 263.

I am informed by the clerk of records and writs and by his predecessor that such an affidavit has always been required, and by the senior taxing officer that such an affidavit is proper and is always taxable. It appears that the judgment in question was signed on the supposition that such an affidavit was among the papers before it was issued; and that its necessity was immediately brought to the notice of plaintiffs' solicitor. As Rule 587 is silent, it does not seem proper, in view of the long continued practice on the point, to hold that no affidavit is necessary as a proof of default. It is against principle to throw any responsibility on the officers of the Court, and make it their duty to ascertain if the necessary default exists or not.

It might happen that the statement of defence had been filed and not served or served and not filed. In either case defendant would technically be in default under Rule 267; and yet it would be reasonable in such case to ascertain if there had not been some oversight on the part of the solicitor before issue of judgment and execution, as was done on this occasion. Plaintiffs' solicitor is free from any imputation of sharp practice, as he might not unreasonably have supposed from defendant's conduct and the correspondence that he was not intending to go on with his defence to the action.

I think, however, that the judgment was irregular and must be set aside, as well as the execution thereunder. . . .

I think justice will be done in this case by making the costs of the motion to defendant in the cause. . . .

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CARTWRIGHT, MASTER. MAY 9TH, 1907.

CHAMBERS.

ILLSLEY AND HORN v. TORONTO HOTEL CO.

Parties—Assignment of Claims—Action Brought in Name of Assignors — Want of Substantial Interest—Insolvency—Motion to Dismiss Action—Security for Costs—Authority of Solicitors—Correspondence—Costs.

Motion by defendants for an order dismissing the action, on the ground that plaintiffs have no substantial interest in it, or in the alternative for security for costs.

H. E. Rose, for defendants.

A. B. Morine, for plaintiffs.

THE MASTER:—This action was commenced on 26th June, 1906. The statement of claim was delivered on 26th November. On 3rd January, 1907, defendants gave notice of motion to dismiss, on the ground that plaintiffs had no beneficial interest herein, and expressed their intention to examine in support of this motion Messrs. Wilkie and Rice of the Imperial Bank and the plaintiff Horn. It was contended that the bank were the real plaintiffs, and should so appear on the record and be liable for costs, especially as they are admittedly assignees of the plaintiffs of any claim they may have aginst defendants.

As a result of this action of defendants, a correspondence took place between Horn and plaintiffs' solicitor on the record. It began with a letter dated 9th January from Horn to Bicknell referring to a telephone conversation between them in which Bicknell had told Horn (as he says) that in the approaching examination he (Horn) would be expected to say that the suit was brought by him, but that this, says Horn, "is a little more than I can do." He further says: "It was the bank, not I, who gave you the instructions for the present suit." At the same time Horn seems to say that he has an interest in this attempt to realize the claim set out in the pleading. No other conclusion is consistent with the concluding paragraph of the letter of 9th January . . . : "The Imperial Bank has always been

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fair to me, and I know that when the matter is settled with the Hotel Co., whatever remains to be adjusted between myself and the bank will be fairly dealt with."

When the correspondence between Horn and Bicknell is examined, it shews that they differ not on the facts but on the proper inference from these facts. This applies to the admitted payments of $250 by Horn to Bicknell and to Mr. Curry, ostensibly as retaining fees paid by Horn to them as his solicitor and counsel in the action.

In consequence of the persistence of Horn in his view that the suit was not his, Bicknell wrote on 17th January: "In view of your letter (of 16th January), I shall refuse to have anything further to do with the suit, and you had better take it to other solicitors." This letter was on the same day returned by Horn, who said it must have been sent to him by mistake: "I know of no suit in your office in which I have anything to do with the appointment of solicitors. If you refer to the pending action on behalf of the Imperial Bank against the Hotel Co., I would suggest that you notify your clients, as their interests might otherwise be prejudiced." Next day the letter of 17th January was again returned by Bicknell, with another letter reaffirming his contention that it was Horn's suit, and concluding: "There is no action pending on behalf of the Imperial Bank against the Toronto Hotel Co."

On 21st January the correspondence ended with a letter from Horn reasserting his view and saying: "I will not, under any circumstances, assume the direction or control of the suit." On the same day Bicknell wrote saying it was no use to prolong the correspondence, and adding: "If you do not wish to proceed with the suit, it can be discontinued."

While this epistolary warfare was going on, there had been a shorter correspondence between Horn and Mr. Wilkie. On 15th January Horn wrote sending Wilkie copies of the correspondence between himself and Bicknell, and alleging that Bicknell's position was "contrary to the facts." In answer Wilkie indorsed Bicknell's position, and said: "The bank in June last absolutely declined to take any proceedings against the Hotel Co., and I understood at the time that you had given Mr. Bicknell instructions to proceed in your own name and on your own behalf. Since then the bank has had nothing to do with the matter." Horn replied expressing his "great surprise and regret" at Wilkie's atti-

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tude. No further letters passed between them. Even, however, in this final letter of Horn's of 23rd January there are expressions of warning which plainly imply that Horn, in his own opinion, is interested in the result of the action. I refer especially to the following paragraph—promising that Osler & Hammond have given the bank a guarantee of $20,000 on the account of Illsley and Horn: "I have discussed the whole situation with Mr. Hammond, and, while his firm are quite prepared to make good their bond, if called on, he concurs with me in the opinion that the guarantors are liable only for ultimate loss, and it is, of course, the duty of the bank to shew it has properly exercised all its legal rights against the primary debtor before calling on the guarantors to make good any loss." This is surely unmeaning verbiage unless it asserts the interest of plaintiffs in the action, and is intended as a warning to the bank that they must pursue their remedies under the assignment given them of this claim by plaintiffs, on peril of being held responsible for such neglect and losing the benefit of Osler & Hammond's guarantee, at least pro tanto, and perhaps altogether. . . .

It was not until 2nd March that Horn was examined. I have read his depositions. They only amplify and reiterate the statements contained in the correspondence. . . .

The question of what constitutes a nominal plaintiff so as to require him, if insolvent, to give security for costs, was considered in Sharp v. Grand Trunk R. W. Co., 1 O. L. R. 200, when the authorities are collected and discussed. From these it is clear that the plaintiffs here are very far from being shadows. The assignments to the bank are not in the nature of a purchase by them. On the contrary, both the firm of Illsley and Horn and the company now in liquidation (Illsley and Horn Limited) expect to get the benefit of anything that may be recovered in the action. Indeed it could not be otherwise when they are plaintiffs. It is true that such recovery will be applied by the bank in reduction of their claims against plaintiffs. But, for that very reason, it is clear that plaintiffs are most vitally interested in obtaining the largest possible sum from defendants so as to release the other securities held as collateral to their account with the bank.

In any case, it is to me quite clear that Mr. Horn is very far from being insolvent. He had no difficulty in pay-

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ing these two sums of $250 each, and it would seem that he must be making considerable payments all the time for pemiums on life policies, and, no doubt, also on Osler and Hammond's bond.

If Mr. Horn seriously contends that this action was brought and is being prosecuted without his authority, he is not without remedy. Himself a member of the legal profession, he is no doubt aware of Scribner v. Parcells, 20 O. R. 554, and of the completeness of the remedies given to any one in whose name an action has been brought without authority. . . .

[Nixon v. Mundett, ante 612, distinguished.]

It is admitted that an order has been made authorizing the liquidator to allow the name of Illsley and Horn Limited to be used as plaintiffs and that the liquidator has been indemnified by a bond "not furnished by the Imperial Bank, but by us on your behalf:" letter of Bicknell to Horn of 15th January. . . .

I do not see how the motion can succeed. Defendants should without further delay put in their statement of defence . . . . Then they can await further developments in perfect safety. If Horn declines to give any further instructions, and Bicknell declines in that case to go on with the action, defendants can move to dismiss for want of prosecution. But, in view of Horn's own letters and his pointed reference to the duty of the bank to press the claim, at the peril of losing their recourse to the Osler & Hammond bond, it does not seem likely that he will take such a suicidal course. . . .

The motion must be dismissed, but, as the facts are somewhat unusual, the costs may be in the cause.

RIDDELL, J. MAY 9TH, 1907.

TRIAL.

BOWINS v. HOME BANK OF CANADA.

Promissory Notes—Invalidity—Illegal Transaction—Stifling Prosecution—Cancellation of Notes—Costs—Misrepresentations—Amendment of Pleadings.

Action for the return of certain promissory notes made by plaintiff and delivered to defendants, in the circumstances mentioned in the judgment.

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F. A. McDiarmid, Lindsay, for plaintiff.

H. T. Kelly, for defendants.

RIDDELL, J.:—The plaintiff, a farmer in Brock township, learned on 28th February, 1907, that his brother Ernest had forged the name of their brother Charles. Having learned this in the village of Cannington, he on his return home discussed the matter freely with his widowed mother and his brother Charles, both of whom resided with him. The mother was naturally very much excited and frightened, and it was decided by plaintiff that he would do all in his power to prevent the punishment of his erring brother. This brother was not living on the farm, but had married, some time before, the daughter of one Daniels, and was living with his father-in-law. On the following day, Friday, the local manager of the defendant bank drove to plaintiff's farm along with the holder of the forged note which plaintiff already knew of. The manager shewed plaintiff a note made by Ernest with his (plaintiff's) name thereon, and plaintiff at once said that the signature was not his. What the manager then said is in dispute, plaintiff saying that, after asking where Ernest lived, the manager said, "I'll go over and see him, and if he does not square up, we'll have him arrested." The manager says: "I did not say anything about arrest. I said it was a serious matter, and we would have to have it straightened up." And he further says that he wanted payment made at once. Though I think plaintiff a very truthful witness, I accept the recollection of the bank manager. The manager then went and saw Ernest, and was assured by Ernest that plaintiff had actually signed the note. The manager did not believe Ernest, and did believe plaintiff; and on the following day Ernest admitted that the note was a forgery.

On Saturday morning, at the instance of the holder of the first-named note, Ernest and the plaintiff went into Cannington, to the holder's house, and were by him taken to the office of the only solicitor in Cannington, who had already been retained by such holder, and had been consulted by the bank manager in connection with the matter. Thereupon the solicitor acted for all parties. Ernest represented that he was the owner of certain chattels and of certain interests in real estate, and it was arranged by plaintiff, Ernest, and the solicitor, that plaintiff should give his notes

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for the amount of the forged securities, and himself take security from Ernest. This was done, with the knowledge and concurrence of the manager and the other holder, though the forged paper was not given up.

Plaintiff found that the chattels which he thought were Ernest's had been mortgaged to Daniels, and on 4th March he repudiated the whole transaction. About 6th March he was informed that Daniels would give up the chattels, but he insisted on treating the whole matter as a nullity. On 8th March his solicitors wrote to the manager saying that they were instructed that the notes had been given on the misrepresentations of the manager and others as to the amount of security that he was to receive. On 15th March the manager answered denying that there were any misrepresentations made by him, and refusing "therefore to give up the notes."

Thereupon this action was brought on 18th March. In the statement of claim plaintiff alleges that the manager and the solicitor for defendants had threatened that they would prosecute Ernest for forgery, and that he thereupon, in order to save his brother from punishment as a forger, gave promissory notes in order to obtain for him immunity from any prosecution for forgery. He then goes on to say that defendants, by their manager and solicitor, falsley represented to him that Ernest was possessed of chattels and real estate amply sufficient to protect plaintiff from any liability upon the said promissory notes, and that, to the knowledge of the solicitor, Ernest was not the owner of any interest in the real estate or any equity in the chattels; and the claim is for the return of the promissory notes.

As to the charge that defendants, by manager or solicitor, made misrepresentations respecting the lands and goods of Ernest, there is not a tittle of evidence to support any such allegation. If any misrepresentations were made, neither manager nor solicitor had anything to do with them. So that, if the action is to depend upon that charge, it must fail.

But plaintiff sets up that the notes were given in order to obtain for his brother immunity from prosecution, and asks to amend his pleading so as to make it clear that he so claims. I think that such an amendment may be made, and (as it cannot take defendants by surprise) without imposing any terms as to costs.

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threaten to arrest Ernest, when he said this was a serious matter and would have to be straightened up, and, later, when the conference took place in the solicitor's office, what he said and did was said and done with the intention and for the purpose of plaintiff's understanding that unless plaintiff would give security for his brother's debt, his brother would be prosecuted, and that if he did give such security the brother would not be prosecuted; that plaintiff so understood, and the manager knew that he did so understand. This being so, the transaction cannot stand. That plaintiff was willing and ready as early as Thursday evening to do all in his power to protect his brother, makes, I think, no difference. No one could imagine, and the manager did not imagine, that plaintiff would be willing to give such security unless to save his brother; and no one could imagine and the manager did not imagine, that if plaintiff supposed that if his giving the securities would not prevent the prosecution, they would have been given. All these persons, plaintiff, Ernest, manager, solicitor, and holder of other notes, were engaged in a scheme to prevent a prosecution—to stifle a prosecution—they were engaged in compounding a felony. The principle that securities obtained under such circumstances cannot stand does not depend upon the doctrine of pressure. . . .

[Reference to Williams v. Bayley, 4 Giff. 638, L. R. 1 H. L. 200.]

With a case so on all fours with the present, it would seem to be useless to examine further. I have, however, read with care the many authorities cited upon the argument, and many more. Some of these are: Bell v. Riddell, 2 O. R. 25; Watts v. Mitchell, 26 Gr. 570; Topence v. Martin, 38 U. C. R. 411 (see especially cases cited at pp. 425, 426); Henry v. Dickie, 27 O. R. 416; Leggatt v. Brown, 30 O. R. 225; Piper v. Harris Manufacturing Co., 15 A. R. 642; Brook v. Hook, L. R. 6 Ex. 89; Wood v. Lloyd, 6 M. & G. 675; Flower v. Sadler, 10 Q. B. D. 572; Jones v. Merioneth, [1892] 1 Ch. 173; Wallace v. Hardacre, 1 Camp. N. P. 45; Davies v. London, &c., Ins. Co., 8 Ch. D. 469; Pollock on Contracts, 6th ed., pp. 553, 554; Leake on Contracts, 5th ed., p. 217.

Several of these cases are instances of a security being obtained from an actual debtor by threat of prosecution,

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which, it has been held, is not in itself a ground for declaring the security void; others are of a different character; but I find no case in which the principles laid down in Williams v. Bayley have been questioned. I follow that case. It is authority also for the proposition that securities which have been obtained in that way should be ordered to be delivered up to be cancelled; and that in that instance the rule "in pari delicto melior est conditio defendentis" does not apply.

There will be no costs—plaintiff and defendants were equally guilty of a great moral wrong.

ANGLIN, J. MAY 9TH, 1907.

TRIAL.

RUETHEL MINING CO. v. THORPE.

Company—Directors—Sale of Mining Properties to Company—Acquisition by Director—Agent or Trustee for Company—Secret Profits—Affirmance of Contract by Company—Return of Notes and Shares—Costs.

Action brought in the name of the Ruethel Mining Co. against the president, William A. Thorpe, and 3 directors, Charles M. Hovey, Archibald McPhail, and Henry C. Rees, for a declaration that a certain mining location in the township of Bucke was bought by defendant Thorpe for and on behalf of the company, and was held by him as agent and trustee for the company, and for a judgment requiring Thorpe and his co-defendants to re-deliver to the company 45,000 shares of the capital stock and promissory notes for $3,500 delivered by the company to Thorpe as consideration for the purchase of the property, which promissory notes and shares were alleged to be held by Thorpe and his co-defendants.

A. H. G. Ellis, Windsor, for plaintiffs.

A. H. Clarke, K.C., for defendants.

ANGLIN, J.:—The Ruethel Mining Co. was incorporated by letters patent issued on 20th September, 1905 (the original subscribers named in the letters patent being W. A.

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McPhail, J. W. Woltz, G. J. Munsell, F. Zabriskie, and A. K. Sweet, all of the city of Detroit), for the purpose of carrying on "the operations of a mining, milling, production, and development company, with a capital stock of $250,000 in 250,000 shares of $1 each." The letters patent named Thorpe, Rees, Newcombe, Hovey, McPhail, Woltz, and Munsell, as provisional directors.

Prior to the application for incorporation of this company, Messrs. Thorpe, Rees, Hovey, Newcombe, and McPhail had formed a syndicate or partnership under the name of the "Nipissing Development Company, Ltd." The articles of association shew that the 5 partners as joint owners contributed to the capital stock the north-west quarter of the south half of lot 7 in the 3rd concession of the township of Bucke, at a valuation of $9,000, and that Newcombe, McPhail, and Hovey jointly contributed in cash $1,000. Of this cash subscription only a small portion was paid. These articles of association bear date 23rd September, 1905.

On 26th September, 1905, the 7 provisional directors of the Ruethel Mining Co. agreed among themselves "to make their official acts from this date binding upon the said company until its charter shall have been granted."

On 29th September the Nipissing Development Co. made a proposal in writing to the directors of the Ruethel Mining Co. to sell to the company the north-west quarter of the south half of the lot aforesaid for 45,000 shares of the capital stock of the Ruethel Mining Co. and $2,500 in cash. The proposal provided that the cash should be paid in instalments, and that the shares of stock should be pooled and be "subject to cancellation in case the property proves a failure after proper prospecting and development, or may be applied to the payment of other property which we hereby pledge ourselves to obtain for the mining company."

At a meeting of the board of directors of the Ruethel Mining Co. held on 30th September . . . the proposition of the Nipissing syndicate was accepted. The 7 provisional directors of the company signed the document of acceptance, which they declare shall be "considered henceforth binding upon the Ruethel Mining Co., Ltd., when it shall have become a duly authorized corporate body, either under its applied name, firm name, or any other name that may be assigned to it by the provincial officers." Though

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the letters patent incorporating the company had actually issued upon the day on which this meeting was held, the directors appear at the time of holding the meeting not to have been aware of this fact.

Upon the evidence before me I find that when this bargain was made defendant Thorpe, at all events, knew, whether his partners in the Nipissing syndicate were aware of it or not, that the portion of lot 7 which was being sold to plaintiff company was in such a position that it was practically of no value. The work necessary to entitle it to pass inspection had not been done, and there appears to have been no intention that it should be done. Nevertheless, there were distinct representations made to the company by Thorpe and his co-defendants that this property, known to be of no real value, was in fact of substantial value and a good and adequate consideration for the shares of stock and money which the company agreed to pay.

Acting upon the faith of Mr. Thorpe's representations as to the value of this property, the directors of the company instructed Mr. Rees, their engineer, to begin operations for development upon it at the earliest moment possible, and they required him to report weekly to the board.

About 3rd October Mr. Thorpe went to Cobalt. He does not appear to have gone for the purpose of looking after the property sold to the company, but in order to look after some other mining locations. A resolution was passed by the Nipissing syndicate that his expenses should be paid by the syndicate and the Ruethel Mining Co., with a proviso that, as far as they could be justly charged against the company, it should be made to bear such expenses. When setting out Thorpe received towards his expenses $50, which had been paid by Mr. Hovey to the Nipissing syndicate and which was subsequently transferred by that syndicate to the Ruethel Co., and credited by the company to Hovey upon his subscription for shares in the company. Mr. Rees did not act upon the resolution of the directors because, as he told Mr. Woltz, Mr. Thorpe had told him that he should not go to Cobalt.

Thorpe learned while at Cobalt of a mining claim upon which two brothers named McMahon were located. He satisfied himself that this claim was worth looking after. and he entered into negotiations with the McMahons to acquire their interests, which he eventually secured for $300.

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ners in the Nipissing syndicate that it could be had, but that he required $300 to secure it. About this time Rees, who was in Detroit, pressed Woltz for payment of his subscription for shares in the Ruethel Mining Co. and got from him $510. Two or three days after Rees got this money from Woltz, a draft for $300 was sent by Rees to Thorpe at Cobalt, with the concurrence of Hovey, Newcomb, and McPhail. Rees insists that it was not part of Woltz's money which was sent to Thorpe, but money belonging to Rees himself. Rees admits that the money sent Thorpe was taken out of the same deposit box in which he placed the $300 received from Woltz. Thorpe was not advised by Rees that the money sent him was aught else than money of the Ruethel Co., for which he had asked, and Thorpe in fact received the money and used it believing it to be Ruethel Mining Co. money. The money paid by Woltz to Rees is credited in the books of the Ruethel Mining Co. as a payment by Woltz upon his stock subscription, and Woltz swears that Rees told him that it was $300 of his (Woltz's) money which had been sent up to Thorpe, and not money obtained from Hovey, Newcombe, and McPhail, as Thorpe had stated to Woltz when questioned about the matter.

Upon this evidence I find that the $300 sent to Thorpe was Ruethel Mining Co. money, and was part of the moneys obtained in stock subscription by Rees from Woltz.

Thorpe had paid $25 to the McMahons as a deposit. This $25 was part of the $50 which he took with him to cover expenses. Out of the $300 received from Rees he paid the balance of $275 to the McMahons, and obtained from them a transfer of their interests in the property to himself.

On 17th November the organization meeting of the Ruethel Mining Company was held. Messrs. Thorpe, Hovey, McPhail, Newcomb, Woltz, Rees, and Munsell were elected directors. The directors subsequently met and passed by-laws. At this directors' meeting there was submitted a proposition from Mr. Thorpe for the sale to the company of his interest in the south-west quarter of the north half of lot 15 aforesaid for $17,000, and other consideration, to be paid as follows: the sum of $3,500 on promissory note of the company and the issue to Thorpe of 66,700 shares of the capital stock of the company, of which 45,000 shares

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should be taken in part payment for the property at 30 cents on the dollar par value per share, and the balance of 21,700 shares to be held by Thorpe in trust to be disposed of with the consent of the directors at a price not less than 30 cents a share, and the proceeds therefrom to be applied in payment of the amount due Thorpe (upon promissory note), and the balance to be paid to the treasurer of the company, to be applied in payment of expenses for development of the property sold, etc. This proposition was accepted by the directors, and its acceptance was confirmed at a shareholders' meeting called for the purpose. At this time, although subscriptions for stock had been obtained from three or four other persons, no allotment of shares had been made, and the only actual shareholders in the company were those named in the letters patent, who were all present, either in person or by proxy, at this shareholders' meeting.

There was no statement, either at the directors' meeting on 17th November or at the shareholders' meeting when Mr. Thorpe's proposition was accepted, that any other person was interested in the sale of the property except himself, nor were any facts disclosed from which it could be inferred that the other members of the Nipissing syndicate were to receive any portion of the proceeds of the sale. The accepted offer for the sale of part of lot 7 was not rescinded, and it was not until 12th March, 1906, that a resolution was passed by the company formally revoking, by mutual consent, the contract for the acquisition of this property.

Upon the evidence before me I am satisfied that Mr. Munsell, one of the shareholders, and a director of the plaintiff company, was unaware of the interest of Messrs. Newcomb, Rees, Hovey, and McPhail in the proceeds of the sale of part of lot 15 by Mr. Thorpe to the company. Although Mr. Woltz was probably aware that Mr. Rees had some interest in the matter, I incline to the view that he was not aware of the interest of Messrs Newcomb, Hovey, and McPhail.

As a matter of fact, Messrs. Rees, Hovey, Newcomb, and McPhail obtained, by indorsement from Mr. Thorpe, promissory notes of the company—Mr. Hovey for $333.33, Mr. McPhail for $333.33, Mr. Newcomb for $333.33, and Mr. Rees for $1,000—and of 45,000 shares of stock issued to Thorpe,

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Hovey, McPhail, and Newcomb, each received 5,000 shares, and Rees 14,500.

Some time afterwards, at the instance of the directors, Thorpe rendered a bill to the company for the balance of expenses upon his trip to Cobalt, 3rd to 26th October, $75.50. This bill the company paid on 3rd March, 1906.

Relying principally upon the fact of the presentation and the payment of this account, and upon the fact that the moneys paid by Thorpe to the McMahon brothers for the acquisition of the portion of lot 15 transferred to the company were actually moneys of the company, Mr. Ellis urged that Thorpe should be held to have acquired this property as agent and trustee for the company, and that the property should be declared to have been always the property of the company upon and since its acquisition by Thorpe. The evidence, in my opinion, does not warrant such a holding. There is no record of any resolution of the company or of its directors sending Thorpe to Cobalt. It is, I think, reasonably clear that in going to Cobalt Thorpe did not go on behalf of the company or with any intention of working for the company, but, on the contrary, went with a view of acquiring property for himself and his co-partners in the Nipissing syndicate, with the intention of selling it eventually to the company. Although his use of the company's money for the purchase of the property was probably unauthorized, and such that he could be made to account for these moneys, I do not think it could upon that fact alone be held that he made the purchase on behalf of the company. The account of $75.50 was not presented until long after the company had in fact purchased the property from Thorpe and at a time when it was well known to the directors who paid the account that Thorpe had acted while at Cobalt in his own interests and on his own account and not for or on behalf of the company.

If the plaintiff company had been seeking rescission of its contract for the acquisition of this property, the evidence would abundantly warrant a decree in its favour; but it does not seek to rescind. On the contrary, they desire to affirm the contract and hold the property.

Thorpe, although a director, purchased this property without a mandate from the company, and in my opinion, not under such circumstances as would make him a trustee thereof for the company. Although probably entitled to a

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rescission of the contract of sale from Thorpe to the company, the company cannot, in my opinion, affirm this contract and at the same time ask the Court to treat the director who openly made the sale on his own behalf to the company, as a trustee of the profit made upon it. There is no evidence of any instructions from the company to Thorpe to purchase the property. Nor was there anything which would have bound him to sell this property to the company. Affirming the purchase, the company cannot require the vendor to take for his property less than he bargained to sell it for. So far, therefore, as the statement of claim seeks to have it declared that Thorpe acquired the property in question as trustee or agent for the company, and that such property was in his hands the property of the company, the action, in my opinion, fails; and it follows that Thorpe cannot be held accountable as trustee to the company for shares and notes received and retained by him as his own: Burland v. Earle, [1902] A. C. 83, 98-9.

But the position of the other defendants, Hovey and McPhail and Rees, appears to be different. They, as well as Newcomb, were co-directors with Thorpe. They received a portion of the consideration paid by the plaintiff company to Thorpe for the property. Their interest as vendors was not disclosed, and was in fact unknown as to all of them to their co-director and co-shareholder Munsell, and as to all except Rees to their co-director and co-shareholder Woltz. They were, in fact, vendors as well as purchasers. Upon such a state of facts, not only would the company be entitled to rescission, but the authorities seem abundantly clear that it may elect to affirm instead of to rescind, and that, in that event, it is entitled to an account from its directors of moneys of the company which they have thus surreptitiously obtained. Mr. Newcomb has voluntarily offered to return the note and shares received by him, if this action should be decided adversely to the defendants Hovey, McPhail, and Rees. For that reason he was not made a party defendant to this action.

It is true that in one sense the company loses nothing by reason of the interest of Messrs. Hovey, McPhail, and Rees in the consideration paid to Mr. Thorpe. The purchase was made from Thorpe upon the assumption that he was to be paid the entire consideration, and the company is is no worse position because part of that consideration in

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fact goes to Thorpe's partners in the Nipissing syndicate. But directors cannot upon such a plea as that be allowed to retain secret profits. They are in the strictest sense trustees for the company, and, as such, they assume a position in which their interest conflicts with their duty at the peril of being made accountable to the company at its election for any profit secretly made out of transactions with the company: Madrid Bank v. Polly, L. R. 7 Eq. 442; In re Brighton Brewery Co., 37 L. J. Ch. 278; Imperial Mercantile Credit Association v. Coleman, L. R. 6 Ch. 558, 566; Gluckstein v. Barnes, [1900] A. C. 240; Palmer's Company Law, 5th ed., p. 166; Turner's Case, 19 O. R. 113.

In my opinion, therefore, the plaintiff company is entitled to judgment as prayed against the defendants Hovey, McPhail, and Rees, and judgment will be entered accordingly against these defendants, with costs. As to the defendant Thorpe, for reasons already stated, the action cannot succeed, but the circumstances of the case are such as do not warrant my giving him costs against the plaintiffs.

MACMAHON, J. MAY 9TH, 1907.

TRIAL.

OLIVER v. McMILLAN.

Parent and Child—Agreement between Father and Son—Rent of Farm—Claim by Son against Father's Estate for Compensation for Services and Improvements — Settlement in Lifetime of Father.

Action by George Oliver against the executor of his father, John Oliver, to recover money for services to the testator and improvements made on land.

M. Wilson, K.C., and J. M. Pike, Chatham, for plaintiff.

G. A. Sayer, Chatham, for defendant.

MACMAHON, J.:—John Oliver died on 19th September, 1905, having made his last will dated 13th May, 1893, the provisions of which necessary to be considered are in these words: "I also require my said executors to pay my son

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George Oliver the sum of $5. I have provided for him sufficient I consider already. . . . I hereby devise my real estate, consisting of the north half of lot number 9 in the 6th concession of the township of Chatham, in the county of Kent, as follows: "I give and devise the westerly 25 acres of the said northerly half of lot number 9 . . . to my son Charles Oliver; the said 25 acres to be divided by a line drawn parallel to the side lines. I give and devise the easterly 25 acres of the westerly 50 acres of the said north half of lot number 9 . . . being the 25 acres lying east of the 25 acres devised to Charles (and divided by a line through the centre of said half lot parallel to the side lines), to my son William Oliver. Each of the aforesaid parcels to have a frontage on the 6th and 7th concession line and to be equal. I give and devise the south-east quarter of the north half of said lot, being 25 acres, to my daughter Mary Ann Bower, to be held by her for her own separate use and free from the control of her husband. I give and devise the northerly half of the north-easterly quarter of said half lot, being 12½ acres, less the bit sold for a school house, to my grandson John Oliver, the son of George Oliver. And I give and devise the southerly half of the north-easterly quarter of said half lot to my grandson William Bower, the son of my daughter Mary Ann."

In 1872, out of the 100 acres about 50 acres of the bush had been cut and partly cleared, and there was a log house on the west 50 acres.

The testator's family consisted of 4 children: George, the plaintiff in the present action, who was born in 1853; William, born in 1856; Charles, born in 1858; and Mary Ann, now Mary Ann Bower.

It was understood in the family that each of the boys should learn a trade, and, according to George's statement while in the box, he started to learn the trade of a carpenter in 1867, when he was but 14 years old. working at it during the summer and returning home and remaining there during the winter months. He said he returned home at his father's request in 1870, and remained there permanently.

On his examination for discovery he said that when his brother William left home to learn a trade his father asked him (George) to stop at home; "that he could not get along without me, and he told me if I would stop at home and take an interest in the place, put up buildings on it, he would

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conversation took place in the house; my mother might have heard it. She might have been in the house."

Robert McKay (a half-brother of George Oliver's) said that 35 or 36 years ago George's father came some miles from where he lived to his (McKay's) mill and said he came up for George (who was working at his trade 14 miles away, in the township of Howard), to bring him home, as he could not do without him; and stated his intention was to give George half the farm next to John Longworth's place, which would be the west half.

John McKay, a relative of Robert McKay, but no connection of the Olivers, gave evidence to the like effect.

The statement of the plaintiff on his examination for discovery as to the time of his return to live on the farm coincides with that of William Oliver that George returned home after he (William) left to learn a trade—that of a machinist. William said he did not leave home until 1872. There was a drain dug by the township of Chatham which passed through the Oliver farm, and Peter McMillan (one of the defendants and an executor of John Oliver's will), who owned a farm in that vicinity, and who was an intelligent and impartial witness, said that the drain was dug in 1871 or 1872, and he had a contract for a section of it; that George Oliver also took a contract for a section in the autumn; and that John Oliver, the father, and George worked on it. William Oliver said the drain was dug before he left home to learn his trade and before George returned to live at home; and that his father and George and Charles and he worked on it.

I conclude that George took the drain contract in the autumn of 1871, after working at his trade during the summer, and that he returned to the farm to remain there permanently after William left in 1872. He was then 19 years old.

At the trial George asserted that his father was indebted to him in $75 for this drain. It was the work of the township, and was paid for by the taxes of all those who benefited thereby. This was one of the "improvements" for which he was seeking compensation when the settlement took place.

During the time George was learning his trade, William and Charles, while at home and when not attending school, helped their father on the farm.

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The evidence shews that the father was an industrious man, and until George left the farm in 1893 helped work it.

From the time George assumed the management of the farm, in 1872, he received all the moneys for the sale of the horses, cattle, and farm produce, which was expended at least in part in building a barn, a stable, corn crib, milk cellar, etc., on the west half of the lot, and in purchasing agricultural implements, etc.

In 1897 George married, and his father agreed to rent him 90 acres of the 100 acre lot, at $150 a year, which included the log dwelling-house, the barn, stable, etc., on the west 50 acres. The farming implements, horses, and cattle were left with George, except two cows and one horse, which the father retained. George built a small house on the 10 acres reserved by the father from the east half of the lot, into which the father, mother, and sister moved.

In 1893, as the rent was greatly in arrear, the father served George with a notice determining the tenancy at the expiration of 6 months. After service of the notice, the father and George met at the office of Douglas, Douglas, & Walker, the former's solicitors, for the purpose of effecting a settlement. The father was claiming over $400 as the balance due for rent; and George was counterclaiming for his services in making the improvements, buildings, etc., put upon the farm, and maintained that he did not owe anything. It was ultimately arranged that George should pay $50 in cash and give his note for $150 in settlement, George to give immediate possession of the 90 acres to his father, but he was to be allowed to feed the straw to his cattle up to 15th March, 1894. . . . .

I find that in 1872 George was told by his father that if he remained at home and worked the place half the farm would be given to him after he (the father) was done with it.

The father did not go after George and induce him to leave working at his trade. George was at home when the offer was made.

George had in August, 1883 (4 years after renting the 90 acres from his father), purchased a 50 acre farm in the 7th concession of the township of Chatham, the price of which was $2,400, and by May, 1893, had paid the whole of the purchase money. That farm was a short distance from his father's place, and George commenced farming on it immediately after it was acquired by him. From the evid-

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said the crops were better than those on the rented farm.

In January, 1893, when the settlement took place, the father, as already stated, claimed over $400 for rent then overdue for two years, while George was claiming for his services and the improvements. The father refused to recognize the claim, for, I suppose, the like reason assigned in his will dated the 13th May, 1893 (four months after the settlement), viz.: "I have provided for him (George) sufficiently I consider already." The father stated to William Coltman, one of the witnesses, that George had beat him out of enough to buy a farm. That is the mode, no doubt, in which he considered George was "provided" for.

William said that George told him if his father paid him for the improvements, he would pay the rent. George gave a questionable denial to Willian's statement by saying "I did not to my knowledge say" what William stated he did say. George afterwards did want pay for the improvements. I find that he did make the statement attributed to him by William.

George, on his examination for discovery, stated that when he leased the 90 acres in 1879, his father left with him horses, cattle, farming implements, etc. And William stated that George told him that the value put on them by his father and himself was $1,000. George also gave an equivocal denial to this by stating, "I did not to my knowledge tell William" what William said he did. I give credence to William's evidence.

George worked the farm under the arrangement from 1872 to 1879, a period of 7 years; and when in 1879 he became tenant of the farm, the farming implements, horses, cattle, and pigs already mentioned were left with him. There was no accounting between himself and his father during the years between 1879 and 1893 for the use of the implements and the increase in the stock. When the father refused to acknowledge George's claim for the improvements, it is manifest that there was, in order to effect a settlement of all matters between them, a compromise. The rent, amounting to over $400, was overdue for more than two years. George admitted that between 1872 and 1879 he sold horses to the value of $1,100, and, had a settlement not been effected, the claim

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of the father and the counterclaim of George must have been settled by the arbitrament of the law.

The will of John Oliver is dated in May, 1893, and he died in September, 1905. The plaintiff was aware in 1895 that no part of the farm was devised to him, but he never went to see his father in relation to it, which he was in duty bound to do if his claim for services and improvements had not been considered and dealt with in the settlement between them. It would be iniquitous when the parties had met for the adjustment of the claims against each other, and a compromise had been agreed upon, if 14 years thereafter and after the death of one of the parties to the settlement, and after the death of Mr. Douglas, K.C., at whose suggestion—according to the plaintiff's statement—the settlement was made, the plaintiff could successfully claim against the dead man's estate.

As I have reached the conclusion that a settlement of all matters in difference between John Oliver and the plaintiff was effected on 28th January, 1893, I dismiss the action with costs.

OSLER, J.A. MAY 9TH, 1907.

TRIAL.

SCOTT v. MILLICAN.

Executor—Removal from Province—Release from Office of Executor and Trustee—Moneys in Hands of Executor—Administration Order—Assignment of Mortgage—Unauthorized Signature—Finding of Fact—Costs.

Action for an injunction, removal of defendant from the office of executor and trustee of an estate, and for administration, and other relief.

M. A. Secord, Galt, for plaintiff.

F. E. Hodgins, K.C., for defendant.

OSLER, J.A.:—Plaintiff and defendant are co-executors and trustees of plaintiff's husband, one James Scott. Defendant is a solicitor, and the management and administration of the estate appears to have been left entirely in his

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hands. Some time ago he left this province and went to Calgary, in the province of Alberta, where he is now practising his profession.

The action is brought for an injunction to restrain defendant from further interfering with the assets of the estate; for an order vesting all the remaining assets in plaintiff; for the removal of defendant from his office of executor-trustee; for an order enforcing the provisions of the will of the testator; and for the administration of the estate and the execution of the trusts.

Defendant alleges that he has rendered to plaintiff a full statement of the assets received and disbursed by him on account of the estate; that he has in hand only $267, against which he has claims for costs, charges, disbursements, and commission, to a much larger amount, and that he had before action offered to retire from his executorship and trusteeship, upon a satisfactory settlement of his claims, being willing to have the accounts taken upon a reference . . . provided his evidence could be taken upon affidavit, in view of the distance he resided from the place where the reference would be carried on.

Part of the assets of the estate was invested by the trustees in a mortgage for $800 or thereabouts made by one Graydon to S. R. Wilkins and assigned by Wilkins to the trustees, who, by indenture dated 25th March, 1898, purported to assign and transfer the same to one Jamieson in consideration of $800, which was received by defendant, and with which he charges himself in the account or statement delivered to plaintiff. The latter alleges that she never authorized the sale of the mortgage, and did not execute and never heard of the assignment, and, though she received from defendant from time to time interest upon the $800, she supposed that it was the interest which had been paid to him by the mortgagor. One of the duplicates of the assignment, but not the duplicate retained by the registrar, purported to be executed by plaintiff; and, her witnesses being in Court, I heard the evidence tendered upon the subject, and find, quantum valeat, as between the parties before me, that the assignment was not executed by plaintiff, and that the signature thereto which purports to be her signature was not written nor authorized by her. I do not see that I am in a position to make any further adjudication in respect of this or

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to declare what, if any, consequences should follow therefrom at this stage.

The defendant executor and trustee having permanently left the jurisdiction, it is proper that an order should be made for his removal from his office, and vesting the assets of the estate in plaintiff as sole executrix and trustee.

The usual order is also to go for the administration of the estate of the deceased James Scott, and for an account of the dealings of defendant with the assets.

I make no order as to costs, except that they are reserved to be disposed of on further directions after the Master shall have made his report. . . .

MAY 9TH, 1907.

DIVISIONAL COURT.

COONEY v. HENRY.

Mortgage—Execution—Delivery—Retention by Husband of Mortgagor—Agency for Mortgagee—Evidence — Action for Foreclosure—Defence.

Appeal by defendant from judgment of CLUTE, J., in favour of plaintiff in an action brought by the executor of a mortgagee for foreclosure. The mortgage was dated 29th May, 1896, and was made by defendant. The defence was that the mortgage was made without any consideration, and never became a completed instrument by delivery.

W. H. Wright, Owen Sound, for defendant.

W. H. McFadden, K.C., and W. S. Morphy, Brampton, for plaintiff.

The judgment of the Court (MEREDITH, C.J., MACMAHON, J., TEETZEL, J.), was delivered by

MEREDITH, C.J.:—My brother Clute found against the defendant, and I agree with his conclusion. The consideration money mentioned in the mortgage represented the amount owing on other mortgages which the testator held upon the mortgaged property, and was given in substitution for them.

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Of the execution by defendant of the mortgage sued on (apart from the question of its delivery) there is no question, and as to delivery the proper conclusion upon the evidence is that it was delivered to the testator. It was executed in pursuance of an arrangement between the testator and his son James, who is the husband of the defendant, and it is not open to doubt that the defendant was a party to the arrangement. The testator was not present when instructions were given to the solicitors for the preparation of the mortgage, and apparently left it to his son to see that the arrangement was carried out. The mortgage was registered on 4th June, 1896. According to the testimony of the son, at his father's request he got the mortgage and the other documents relating to the mortgaged property from the solicitors some time after the registration of the mortgage, and took them to his own home, intending to give them to his father later on, but that was not done. The mortgage appears to have been executed in the presence of the clerk of the solicitors in whose office it was drawn, at Markdale, and his affidavit proving the execution of it was sworn on 3rd June, 1896. That the mortgage was accepted by the testator is not, I think, open to question, nor is it open to doubt that it was in the possession of the defendant's husband as his agent from the time the latter obtained the papers from the solicitors. That the defendant knew that the papers, including the mortgage sued on, were held by her husband for his father, was practically admitted by her in her testimony at the trial, and is manifest from her letter of 21st January ,1900, to the testator, in which she says, referring to the mortgage and the other papers. "Your papers is all right and safe."

I do not see how defendant's case is helped by what is said to have taken place when the testator visited defendant in the spring before his death. Nothing that was said by him, assuming that he said all that the defendant and her two children testified that he did say, could have the effect of conferring any right on defendant, and, instead of what was said helping her case as to the mortgage transaction never having been completed, it makes against it, for both parties treated the papers that were referred to as something over which the testator had control.

A good deal was attempted to be made by counsel for defendant of the fact that the testator did not execute the dis-

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charges of the prior mortgages when they were sent to him for execution by the solicitors, but, even if that circumstance would otherwise have been important, it is explained by the fact that the solicitors accompanied their request with a statement of their charges, which they asked him to remit when returning the discharges.

In my opinion, the appeal should be dismissed.

MAY 9TH, 1907.

DIVISIONAL COURT.

HARE v. KRICK.

Landlord and Tenant—Oral Agreement for Lease—Tenant in Possession — Disturbance of Possession — Trespass—Lease to Stranger—Notice—Registry Laws — Damages—Injunction.

Appeal by defendants from judgment of MULOCK, C.J., 8 O. W. R. 620.

The appeal was heard by MEREDITH, C.J., MACMAHON, J., TEETZEL, J.

W. M. Douglas, K.C., for defendants Krick and Waines.

S. H. Bradford, for defendant Hoover.

G. Lynch-Staunton, K.C., for plaintiff.

MEREDITH, C.J.:—Assuming the parties to stand on an equal footing as to credibility, the position of matters at the first was that plaintiff thought an agreement had been come to for a lease to him for two years from about 1st June, 1906, and defendants that an agreement had been reached for a lease for one year from 1st October, 1906, and, if this were all, they were therefore never ad idem, and no agreement was arrived at. It was, however, strenuously argued by counsel for plaintiff that the proper inference from what subsequently took place is that the defendant Hoover afterwards assented to plaintiff's proposition that the term should be two years, and if he did that, the only matter left open was settled, and the parties were ad idem.

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In support of this argument counsel relied upon the testimony of plaintiff that shortly after 20th May, 1906, the defendant Hoover told him that Brett would rather he (the plaintiff) would keep the place for one year only, and that he replied: "Absolom, it would not pay me to summer fallow that field all year, to draw out that manure and put all that extra work on there for one crop;" and that defendant Hoover replied: "It would be all right; if Brett wants any more land he can have it; it is up there; there is lots of it."

Counsel also relied upon what had subsequently taken place as raising an estoppel which prevented defendant Hoover from asserting that there had not been an assent on his part to the term of the bargain upon which plaintiff was insisting.

It is in evidence that plaintiff, after the interview just referred to, to the knowledge and with the assistance of defendant Hoover, drew from the latter's farm yard about 150 loads of manure, which were spread upon part of the land in question, and afterwards ploughed in, and that other work was done by plaintiff, including the ploughing and sowing with fall wheat in September, 1906, of part of field A.

Had the Chief Justice adopted this view, I should not have hesitated to agree with it, but, as he has not done so, that aspect of the case must be dealt with unaided by any finding in favour of plaintiff, if indeed the result of the findings of the Chief Justice is not upon this branch of the case against plaintiff.

Upon the best consideration I have been able to give, and after a careful examination of the evidence, I have come to the conclusion that the contention of plaintiff is entitled to prevail.

There is no denial, at all events no satisfactory denial, by defendant Hoover of the conversation deposed to by plaintiff, and, bearing in mind that Brett had no legal right to a lease, and that it was in the power of defendant Hoover to lease to plaintiff for two years or for any other term without the consent of Brett, or even against his will, it is, I think, a fair inference from what plaintiff says took place, especially when it was followed by what, as I have mentioned, subsequently occurred, that defendant Hoover assented to what was insisted on by plaintiff—that the term should be "two years"—and that the necessary consensus to constitute a complete agreement was then reached.

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It appears to me, too, that after that conversation took place, even if what occurred did not constitute the completion of an agreement for a lease for two years, defendant Hoover must have known that plaintiff was going on on the faith that he was to have a two years' lease, and that he is now estopped from asserting that that was not the term agreed upon.

The testimony of defendant Hoover does not appear to have been given in a very satisfactory manner, and is in many respects inconsistent with his examination for discovery. Nowhere throughout his testimony does he say that he did not know plaintiff was doing the work that he was doing on the land under the belief that the agreement was for a lease for two years.

Defendant Hoover's conversation with Cunningham, in June, 1906, when spoken to about having rented the farm to plaintiff, is a not unimportant circumstance in favour of plaintiff. According to Cunningham's testimony, defendant Hoover's answer to his question was that they had come to an agreement, and that being asked for how long, the answer was, "Hare wanted it for two years, and I guess I will let him have it that way." This is denied by defendant Hoover, but I think Cunningham's testimony should be accepted in preference to his.

It is, I think, not improbable that defendant Hoover, who, except for his moral obligation to Brett, was indifferent whether the term was to be two years or one year, was impressed with the reasonableness of the position taken by plaintiff that it would not pay him to go to the expense he would be put to in manuring the land and preparing it for the crop of fall wheat, if his only return was to be one crop: and I am strongly inclined to think that no question would have been raised by defendant Hoover but for his desire to exploit the land for gas purposes, which apparently was not in contemplation when the transaction between him and plaintiff took place.

The Chief Justice has held that plaintiff is not entitled to the land for two years, but for one year only from 1st October, 1906. I am unable to agree with that view. If plaintiff's rights depended on an agreement for a one-year term having been proved, I should have agreed with the contention of defendants' counsel that the judgment ought to

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be reversed, for, in my opinion, unless the view I have taken is the correct one, the parties were never ad idem.

The mere fact that defendant Hoover conceded in his testimony at the trial that plaintiff was entitled to the land for a year from 1st October, 1906, met as it was by the distinct statement of plaintiff that there never was any such agreement, his case as made in the pleadings, and the statement of his counsel in opening the case at the trial, would not, in my opinion, warrant a finding that the agreement was for a term of one year from 1st October, 1906.

The plaintiff has not, however, appealed, and is apparently content with the judgment he has obtained, and, although I am of opinion that his rights are greater than they have been held to be, the result must be the affirmance of the judgment, and I would therefore affirm it and dismiss the appeal with costs.

TEETZEL, J., agreed in the result.

MACMAHON, J., dissenting in part, was of the opinion that the judgment at the trial should be varied.

BRITTON, J. MAY 10TH, 1907.

WEEKLY COURT.

EMBREE v. McCURDY.

Appeal to Court of Appeal—Stay of Proceedings—"Further Proceeding"—Motion for Injunction—Rule 829.

Motion for injunction to restrain defendant from further dealing with the partnership moneys in this action, and particularly certain money on deposit in the Dominion Bank at Toronto, or for a receiver.

B. N. Davis, for plaintiff.

W. E. Middleton, for defendant.

BRITTON, J.:—This action was commenced by writ of summons issued on 11th January, 1906. It was first tried on 28th September, 1906, and resulted in judgment for plain-

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tiff, with a reference to the Master in Ordinary to take the partnership accounts.

A new trial was ordered on application of defendant, and the second trial was had on 27th February, 1907, upon which plaintiff again succeeded.

The defendant by special leave has appealed to the Court of Appeal. Security, as required by Rule 826, has been given, and execution upon the judgment appealed from has been stayed, pursuant to Rule 827.

It is argued for defendant that now all further proceedings in this action in the Court appealed from should be stayed, unless otherwise ordered by the Court of Appeal or a Judge thereof.

I think an application for an injunction now made for the first time in this action is "a further proceeding . . . other than the issue of the judgment or order and the taxation of costs thereunder," and so by Rule 829 I am prevented from dealing with this application on its merits, unless an order is made or leave granted by the Court of Appeal or a Judge thereof.

The defendant consents that the plaintiff may, if so advised and upon the material before me, make an application to the Court of Appeal, or to a Judge thereof, for an order for an injunction, or for leave to apply to a Judge of the High Court of Justice for such injunction; so this may stand for 10 days—the plaintiff to decide in the meantime what he will do.

The plaintiff will not, in my opinion, be at all prejudiced by this delay—as the defendant swears that he is a man of substance, able to meet any amount for which he may ultimately be found liable to the plaintiff, and the plaintiff in his affidavit, paragraph 11, does not say more as to his liability to loss than this: "It will be some months at least before the said appeal can be disposed of; I apprehend that the said partnership moneys may be drawn out and used by the defendant in his own private business, to my detriment."

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RIDDELL, J. MAY 10TH, 1907.

TRIAL.

SMITH v. TOWNSHIP OF ELDON.

Municipal Corporations — Drainage—Repair of Highway—Watercourse — Injury to Land — Remedy—Action—Injunction—Damages.

Action for an injunction and damages in respect of injury to plaintiff's land by water and sand owing to the negligence of defendants as alleged.

T. Stewart, Lindsay, and M. H. Roach, Beaverton, for plaintiff.

F. A. McDiarmid, Lindsay, for defendants.

RIDDELL, J.:—The plaintiff is the owner of lot No. 1 in the 7th concession of the township of Thorah, in the county of Ontario, his land abutting on the east upon the town line between the townships of Thorah and Eldon. What is called the 3rd quarter line or side road in Eldon comes from the east out to the town line about the middle of the plaintiff's land. To the east along this quarter line for the whole length of the concession No. 1 of Eldon, about 3,800 feet, runs a ditch on the east side of the quarter road. This receives a great quantity of water from marshes, etc., further east during the freshets and heavy rains, and carries this water mixed with sand down west to the town line, and there some goes through a culvert B. toward the west along the east side of the town line, some through and some over a culvert C. which crosses the town line at the end of this drain. A great part of the latter and some of the former gets upon the land of the plaintiff with the accompanying sand, and has done him considerable damage. . . .

Before the year 1903, the water which came from the east along the quarter line was intercepted by a culvert across the quarter line at the point A., rather more than half way fom the town line to the next concession road east in Eldon. This road was called the Second road, being between concessions 1 and 2 of Eldon township. The water so coming from the east was also prevented from running west beyond A. by a small elevation or knoll a short distance west of A.

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The water, then, crossed through or sometimes over the culvert at A. and made its way down what was called at the trial . . . "old watercourse," diagonally across lot 15, concession 1, Eldon, to a point marked D. In the freshets and heavy rains some of this water was wont to make its way across the town line and partly get upon the plaintiff's land at about the point D., and, doing comparatively little damage, make its way west over part of the plaintiff's land. along the 7th line of Thorah or west along the town line. What is called the "old watercourse" is not legally a watercourse, but rather a low, wet, and swampy stretch having no defined banks or channel—but, beyond question, that was the natural course of the flow of the water.

In 1903 the council of the township of Eldon determined to repair the 3rd quarter line. In doing so they, through their commissioner, deepened the ditch on the east side of the quarter line, and cut through the knoll, thereby allowing water coming from the east to make its way along the north side of the line toward the west to the town line. The land is sandy, and the defendants must have known that the necessary result would be that the water would make the drain larger and deeper by washing away the sand from bottom and side, and that this would result in a large flood of water and mass of sand being carried along this drain. The defendants and their commissioner must have known that unless ample provision were made for the carrying off of this water and sand, some must necessarily get upon the plaintiff's land and injure him. This was quite unnecessary for any purpose of repairing the road, and permitting the waters from further east to flow west of A. was useless so far as the road was concerned. Instead of culvert at A. being enlarged. it has been allowed to become at least partly choked up. But, even if culvert A. were wholly open, the water would run past in large volume. And at B. the culvert in the east side of the town line is partly choked up; and, to make matters worse. the drains in the east and west side of the town line are almost wholly filled with sand. All this should have been foreseen by the defendants, and their conduct has been negligent.

The defendants had no right to open a drain along the side of the 3rd quarter line as they did—their so opening was wrongful; and if it be said that they did this as an

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highway was negligently done.

This being so, the remedy of the plaintiff is, under the authorities, by action and not by arbitration: McArthur v. Collingwood, 9 O. R. 368, see p. 375; Malott v. Mersea, 9 O. R. 611; Nickle v. Walkerton, 11 O. R. 433; Stalker v. Dunwich, 15 O. R. 342; Derinzy v. Ottawa, 15 A. R. 712, see pp. 713, 714, 716; Pratt v. Stratford, 16 A. R. 5; Sombra v. Chatham, 18 O. R. 252, and cases cited.

The plaintiff is entitled to an injunction restraining the defendants from the continuance of the nuisance to his land and from causing water and sand to be deposited upon his land. . . .

By request of both parties there will be a reference to the Master at Lindsay to determine the damages to which the plaintiff is entitled.

The defendants will pay the costs to and including judgment: further directions and costs reserved until after the Master shall have made his report. To enable the defendants to make suitable provision for the disposition of the surplus water, the operation of the injunction will be stayed for 4 months from this date.

ANGLIN, J. MAY 10TH, 1907.

TRIAL.

DEACON v. KEMP MANURE SPREADER CO.

Company — Winding-up — Ontario Joint Stock Companies Winding-up Act—Order under—County Court Judge—Jurisdiction—Action to Set aside Order—Fraud—Collusion—Improper Concealment of Facts—Injunction—Petition—Service on Solicitors—Holders of Preferred Shares—Priority over Holders of Common Shares—Distribution of Assets—Effect of Order—Resolution of Company—Liabilities—Untrue Statement — Status of Petitioner—Contributory—Dispute as to Liability—Appointment of Liquidator—Application of Member of Company—Sale of Assets—Provision for Delivery of Charter to Purchaser—Dismissal of Action—Costs.

Action by a shareholder in defendant company for a declaration that an order for the winding-up of the company,

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granted by the Judge of the County Court of Perth, was made without jurisdiction, and was obtained by fraud, collusion, and improper concealment of facts, and for an injunction restraining defendants from acting under the order, and especially restraining defendant Jeffrey from acting as liquidator of the company thereunder.

G. H. Watson, K.C., and R. S. Robertson, Stratford, for plaintiff.

W. H. Blake, K.C., and G. G. McPherson, K.C., for defendant company.

J. C. Makins, Stratford, for defendant Miller.

ANGLIN, J.:—The defendant company was incorporated by letters patent bearing date 3rd September, 1902, with a share capital of $60,000, divided into 600 shares of $100 each. Immediately following the provision for payment of preferential dividends, the letters patent contain the following clause: "And we further ordain and declare that the preference stock shall become and remain a lien on the assets of the company, so that, in the event of the voluntary or compulsory winding-up of the company, the holders thereof shall be entitled to receive the amount of their stock, together with unpaid dividends, if any, in full at par, before the holders of ordinary stock shall receive anything on account of their stock."

By supplementary letters patent dated 29th October, 1903, the capital stock of the company was increased from $60,000 to $150,000 by the issue of 900 shares of new stock of $100 each.

By agreement dated 22nd September, 1904, the validity of which is not questioned in this action, the defendant company undertook to sell to the Massey-Harris Co. all the defendant company's property and plant, office furniture, shop furniture, fixtures and utensils, patents, patent rights, trade marks, franchises, privileges, rights, options, and business goodwill, including the right to use the name of the defendant company, and all property and assets of every kind and nature whatsoever of the defendant company, except only bills receivable, accounts receivable, advertising matter, and cash on hand; and undertook to deliver to the purchasers the letters patent of incorporation of the defendant company and its minutes and records, and, if the purchasers should

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call for the same, a majority of the shares or stock all fully paid in the defendant company. The purchase price to be paid to the defendant company was $51,000 and the factory cost price of manufactured or partly manufactured goods. The defendant company covenanted not to enter upon, carry on, engage or be interested or concerned in the manufacture or sale of manure spreaders within Canada during a period of 10 years, and to co-operate with and assist the purchasers to obtain and retain the goodwill and business of the defendant company. By by-law No. 11 the directors of the defendant company approved of the sale of assets under this agreement, the by-law containing a recital that "it is desirable to sell and dispose of the assets of the company and to collect in all bills and accounts receivable and to distribute the proceeds thereof to the shareholders." This by-law was read and approved at the meeting of shareholders of the company held on 10th October, 1904.

The agreement of sale was carried out, and the directors were in the course of realizing outstanding assets and distributing the proceeds amongst the shareholders, when they received a letter from plaintiff's solicitors, addressed to the secretary of the company, dated 23rd January, 1906, notifying the company and the board of directors that plaintiff objected to the assets of the company or any part of them being paid over to the holders of preferred stock in priority to the holders of common stock, in the manner which he understands is proposed. The latter further states that it is not to be taken as an acquiescence on the part of Mr. Deacon in any distribution of the assets by the board of directors. Mr. Deacon followed up this letter by an action in which he sought to restrain the directors from distributing the assets of the company, and to obtain a declaration with respect to the rights of the common and preferential shareholders in the surplus assets of the company. The company appear to have been advised that, in lieu of proceeding with the distribution of the assets by the directors, as had been intended, measures should be taken for the winding-up of the company's affairs. The directors, accordingly, on 3rd March, 1906, determined to hold a special meeting of the shareholders for the purpose of passing an extraordinary resolution for the winding-up of the company. Plaintiff's solicitors were advised of this intention and requested to refrain from entering the then pending action for trial. On 5th March notice was given of

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the shareholders' special meeting in the following form: "Stratford, March 5, 1906. Dear Sir: Notice is hereby given that a special meeting of the shareholders of the Kemp Manure Spreader Co. Limited will be held in the board room of the city hall, Stratford, on Friday the 16th day of March, 1906, at 10 o'clock a.m., at which meeting it is the intention to propose the passing by the meeting of an extraordinary resolution as defined by the Joint Stock Companies Winding-up Act, R. S. O. 1897 ch. 222. Yours truly. The Kemp Manure Spreader Co. Limited, per W. Jeffrey. secretary."

On 16th March this shareholders' meeting was held. Holders of 484 shares were present in person or by proxy. A resolution was put and carried "that it has been proved to the satisfaction of the company that the company cannot by reason of its liabilities continue in business, and that it is advisable to wind up the same"—Mr. Deacon, the plaintiff, who holds 5 shares of common stock, being the only dissentient. It was also resolved that William Jeffrey be appointed liquidator of the company, and that Messrs. Durton and Ballantyne be appointed inspectors. It was then understood that the pending action by Mr. Deacon would be withdrawn upon payment of costs. Having in some way learned that it was intended to apply for an order for the winding-up of the company, plaintiff's solicitors, on 6th April, wrote to Messrs. McPherson & Davidson, solicitors of the company, asking that they be notified of any such application, as they were instructed to attend and oppose the same, if deemed advisable.

On 21st April a petition was prepared on behalf of the defendant Walter Miller seeking an order for the winding-up of the company. The petition was prepared in the office of Messrs. McPherson & Davidson, but is signed by Messrs. Makins & Hanley, solicitors for the petitioner, and in their name notice of presentation is given for 27th April, and service of the petition and notice is admitted by Messrs. McPerson and Davidson, solicitors of the company. Mr. Miller makes affidavit verifying the statements in the petition and exhibiting a copy of the minutes of the shareholders' meeting of 16th March.

The petition states the incorporation of the company, refers to the original and supplementary letters patent and to the agreement with the Massey-Harris Co. It also contains

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the following paragraph: "The company claim that your petitioner is a contributory, although your petitioner disputes the claim, and the company have brought an action in this honourable Court against your petitioner to compel him to pay over $500 for shares upon which the company allege that your petitioner is liable." Notice of the presentation of this petition was not given to the solicitors for plaintiff. On 27th April the County Court Judge made an order declaring that the defendant company is insolvent and liable to be wound up under the provisions of the Winding-up Act, R. S. O. 1897 ch. 222, and ordering that the company should be wound up under the provisions of the Act, and appointing William Jeffrey permanent liquidator.

Mr. Jeffrey appears to have preceeded with the liquidation of the company, and on 19th November obtained from the County Court Judge an order authorizing the payment of the claims of a number of creditors, and payment of "a dividend of 60 cents on the dollar, amounting to $18,000, distributing the same among the preference shareholders at the rate of 60 cents on the dollar, on the amount of stock held by such preference shareholders respectively."

The present action was commenced on 8th May, 1906. On 7th June a motion for interim injunction restraining Jeffrey from acting as liquidator of the company, or otherwise, under the winding-up order, was refused by Meredith, C.J., and on appeal to a Divisional Court this order was affirmed, the Court taking the view that the provisions of sec. 33 of R. S. O. 1897 ch. 222, enabling the County Court Judge at any time to stay proceedings in relation to the winding-up afforded plaintiff ample protection, and that he should have availed himself of this provision rather than have sought an interim injunction.

Plaintiff objects to the order for winding-up upon the following grounds: (1) that the petition for the winding-up order was not served upon the company, but only upon the company's solicitors; (2) that the petition did not disclose the fact that the relative rights of preferential and common shareholders in the capital of the company would be affected prejudicially to the latter by the winding-up order; (3) that the resolution set forth in the petition that the company could not by reason of its liabilities continue in business was untrue; (4) that the petitioner Miller was incompetent, be-

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cause he disputed his liability as a contributory; (5) that the appointment of a liquidator by the Court could only be made where there is no liquidator acting, either provisionally or otherwise, and then only on the application of a member of the company; (6) that a winding-up order cannot be made merely to provide for distribution of assets; (7) that the provision of the agreement with the Massey-Harris Co. by which they were to receive delivery of the charter of the company was not disclosed to the County Court Judge.

Defendants contend that this action is not maintainable, and that, if it is, no case of want of jurisdiction or of collusion or fraud or suppression of material facts has been established.

The substantial ground of complaint on the part of plaintiff is that as a result of the winding-up proceedings the preference shareholders have put themselves in a position to claim payment out of the assets of the company of the full face value of their preference shares before anything is paid to the common shareholders upon their shares. He maintains that under the provisions of the agreement with the Massey-Harris Co. and upon a distribution of assets by the directors without winding-up proceedings, the common shareholders would have been entitled to rank pari passu with the preference shareholders in the distribution of assets.

Unless plaintiff is right in this contention, the setting aside of the winding-up proceedings would serve no substantial purpose. If for any reason such proceedings are defective, and if the defects be of such moment that these proceedings should be set aside, plaintiff's position would not be at all improved, unless the result would be to place common shareholders upon the same footing as preference shareholders in regard to the capital of the company.

After a careful consideration of the letters patent, I cannot see how, in any event, common shareholders can claim to be entitled to payment out of capital of the amounts of their shares, or of any part of them, until preference shareholders shall have been paid in full. The letters patent "ordain and declare that the preference stock shall become and remain a lien on the assets of the company so that, in the event of the voluntary or compulsory winding-up of the company, the holders thereof shall be entitled to receive the amount of their stock, together with unpaid dividends, if any, in full at par, before the holders of ordinary stock shall re-

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ceive anything on account of their stock." The plain meaning of this language is to give a preference to the holders of preference shares in respect of capital. Preference stock is made a lien on the assets of the company. The additional clause dealing with voluntary or compulsory winding-up is merely an illustration of how, in such proceedings, that lien shall be worked out. This clause does not restrict or cut down the lien which is given in general terms, and, that lien subsisting, it must be satisfied, in whatever manner the assets of the company are distributed, before holders of common stock are entitled to payment: Heller v. National Marine Bank, 89 Md. 602; Skiddy v. Atlantic, Mississippi, and Ohio R. R. Co., 3 Hughes (U. S. Circuit) 320, 355; McGregor v. Home Ins. Co., 33 N. J. Eq. 181, 186; Re Bangor and Portmadoc Slate and Slab Co., L. R. 20 Eq. 59. The language of Jessel, M.R., in Griffith v Paget, 6 Ch. D. 511, at pp. 516-7, is very applicable to this case.

The only allusion in the agreement with the Massey-Harris Co. to distribution of assets occurs in a clause which postponed the right of the purchasers to delivery of the shares or stock, which the vendors undertook should be assigned to them upon demand, until "the Kemp Manure Spreader Company, Limited, shall have had a reasonable time to liquidate and collect their said bills and accounts receivable and to distribute the proceeds thereof among their shareholders." I fail to find in this language anything which warrants a suggestion that this "distribution of proceeds" should be upon any other footing than that contemplated by the letters patent. It would require language much more explicit to support a declaration that the preference shareholders had by sanctioning this agreement waived or abandoned their preferential lien upon the assets of the defendant company.

Neither in the terms of the letters patent nor in the provisions of the Massey-Harris contract do I find anything which would support the view that upon a distribution of assets in any manner the common shareholder should rank pari passu with the holders of preference stock.

I am, therefore, unable to discover any merit in plaintiff's action. It remains to be seen whether upon technical grounds he is entitled to succeed.

As to the first objection, the company take no objection to the service of the petition upon their solicitors. They are before the Court adopting and ratifying the solicitors' ac-

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ceptance of service. The plaintiff cannot, in such circumstances, be heard to maintain this objection.

(2) The petition refers to the letters of incorporation, and it has not been shewn that these letters were not themselves before the County Court Judge when he made his order. But in any event, in the view I take of the letters patent, the making of the winding-up order did not materially affect the rights of plaintiff and other holders of common stock.

(3) The resolution set forth in the petition was in fact passed by the shareholders' meeting. . . .

[Reference to sec. 4, sub-sec. 3, and sec. 3, sub-sec. 4, of the Joint Stock Companies Winding-up Act; In re Silkstone Fall Colliery Co., 1 Ch. D. 38; In re Bridport Old Brewery Co., L. R. 2 Ch. 191.]

It was a resolution that, in the judgment of the company, though solvent as respects creditors, it could not, by reason of its liabilities, continue its business, and that it was advisable that it should be wound up. The resolution is not shewn to be untrue by proving that the liabilities were comparatively small, and that the company was solvent as regards creditors. Moreover, under sec. 5 of the statute, the jurisdiction to make an order for winding-up in nowise depends upon the passing of such a resolution. It would require much more than has been shewn here to invalidate the order pronounced by Judge Barron upon this ground for want of jurisdiction or suppression of material facts or fraud.

(4) A petition for winding-up may be presented by the company or by any contributory of the company: sec. 32. "Contributory" means every person liable to contribute to the assets, "and shall also, in all proceedings prior to the final determination of such persons, include any person alleged to be a contributory:" sec. 3, sub-sec. 2. In several English cases it has been held that the petitioner must admit himself to be a contributory: sec. 3, sub-sec. 2. In several English cases it has been held that the petitioner must admit himself to be a contributory: In re Continental Bank Corporation, [1867] W. N. 114; Lindley's Law of Companies, 6th ed., p. 844. I confess to difficulty in understanding how the words "alleged to be a contributory" can be read as equivalent to "who admits himself to be a contributory." But under sub-sec. 32 the company may itself present the petition, and we have here a case in which the company was

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and the fact that the company was represented upon the presentation of the petition, and assented to the making of the order. This ground of objection, which would probably in any event be available only to the company itself, therefore, in my opinion, fails.

(5) If, as plaintiff contends, the resolution of 16th March, 1905, was ineffectual as an extraordinary resolution because of informality in the notice calling the meeting, there was no liquidator acting when the winding-up order was made, and it was therefore competent for the County Court Judge, under sec. 25, sub-sec. 2, to appoint a liquidator. The appointment was made upon the application of defendant Miller. The company alleges that Miller is a shareholder. . . . By sec. 3, sub-sec. 6, members of the company are defined as "those persons only who for the time being are entitled to vote at general meetings of the company," and by R. S. O. ch. 191, sec. 64, it is enacted that "no shareholder being in arrear in respect of any call shall be entitled to vote at any meeting of the company." Under this provision it is contended that Miller is not a member. The liquidator appointed, however, was a person named as liquidator by the company itself, on 16th March, when it attempted to pass an extraordinary resolution for winding-up. The company was represented upon Miller's application for the appointment of Mr. Jeffrey as liquidator, and assented to such an appointment. I am not prepared to hold that, under these circumstances, merely because the applicant Miller may not have been a fully qualified member, the County Court Judge had not jurisdiction under sec. 25 to appoint Mr. Jeffrey, the nominee of the company, as liquidator. As an incident of pronouncing a winding-up order, he probably had jurisdiction under sec. 5 to name a liquidator.

(6) In the present case the affairs of the company are not in such a position that nothing is to be done by the liquidator except to distribute assets among the shareholders: Re Amalgamated Syndicate, [1897] 2 Ch. 600, 604. Certain outstanding book-debts and accounts due to the company were, at the time of the making of the winding-up order, still to be collected, and, as shewn by the order of 19th November, certain liabilities of the company had then still to be paid. But, even if it be improper to make a winding-up order where the sole purpose to be served is the distribution of assets and

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the adjustment of the rights of shareholders, I doubt whether it could be said that a Court pronouncing such an order had no jurisdiction to make it. Section 5 enables the Court to make an order where it is of opinion that "it is just and equitable that the company should be wound up." This language is very broad, and gives to the Court a very wide discretion. It seems to me impossible to hold that, where jurisdiction is conferred in such terms as these, and it has been shewn that the making of the winding-up order is, in the opinion of the company itself, a proper and desirable thing, and in the best interests of all concerned, the exercise of that jurisdiction by the Court can be reviewed in such an action as the present.

(7) . . . The Massey-Harris agreement was referred to in the petition. . . The provision in that agreement for the delivery of the charter to the Massey-Harris Co. is, in my opinion, ultra vires of defendant company. It certainly would not stand in the way of any legal requirement that the charter should be delivered up, upon dissolution of the company, to the Provincial Secretary for cancellation.

The whole case of plaintiff, so far as it rested upon allegations of fraud in the obtaining of the order for winding-up, depended upon the supposition that the winding-up order prejudicially affected the interests of the common shareholders in the distribution of the capital of the company. He has entirely failed to make out such a case of fraud as would justify interference. . . .

[Reference to Johnston v. Barkley, 10 O. L. R. 724, at p. 728, 6 O. W. R. 549.]

Fraud has not been clearly made out, and it has certainly not been shewn that that which plaintiff alleges to have been fraud lay at the foundation of the decision attacked.

In the view which I have taken of plaintiff's case, it is unnecessary to decide whether an action lies in this Court to obtain a declaration that a winding-up order pronounced by a County Court Judge under the Ontario Winding-up Act is null and void, and to set the same aside. The statute provides for an appeal by any party dissatisfied with any order or decision of the Court in any proceeding under the Act (sec. 27), and also provides (sec. 23) that a Court may, at any time after the order has been made for winding up a company, make an order staying all proceedings in relation to the winding-up, either altogether or for a limited time,

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on such grounds and subject to such conditions as the Court deems fit. Plaintiff, being a person affected by the winding-up order, could probably have appealed when that order came to his notice, under sec. 27. If not, he could move under sec. 33, and if his application were refused, he could have appealed from such refusal. In view of these provisions of the statute, it seems to me more than doubtful whether the present action could be maintained; but it is unnecessary to determine that question. . . .

Plaintiff has failed to satisfactorily establish want of jurisdiction in the County Court Judge upon any of the grounds which he has taken. His good faith in bringing this action, in view of the conditions under which his former action was dismissed, the company undertaking to pay his costs, is, I think, open to serious question. Plaintiff having sought to shew want of jurisdiction and to establish fraud, by which, in his reply, counsel for plaintiff asserted that he meant moral fraud and dishonesty, and having failed upon both branches, his action will be dismissed with costs.

WINCHESTER, SURR. C.J. MARCH 4TH. 1907.

SURROGATE COURT, YORK.

RE LOMAS.

Will — Execution—Two Attesting Witnesses—Addition of Signature of Sole Devisee Apparently as Witness—Affidavits—Explanation that Signature not so Intended—Admission to Probate.

Application by Fannie Lomas, widow of the deceased, for letters probate of the will of Frederick G. Lomas, who died on 15th February, 1907, having first made his will dated 4th February, 1907, whereby he devised all his estate to his wife, and thereby appointed her sole executrix.

The will was signed by the testator in the attestation clause, and the names of Fannie Lomas (the widow and executrix) and Mary Sarah Lomas and H. Lomas were signed at the foot of the will, to the right of the attestation clause, apparently as witnesses, as follows:—

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"Signed, published, and declared by the said "F. G. Lomas," the *testator*, as and for *his* last will and testament, in the presence of us, who, both present together at the same time, in *his* presence, at *his* request, and in the presence of each other, have hereunto subscribed our names as witnesses."	"Fannie Lomas." "Mary Sarah Lomas." "H. Lomas."

The will was printed, leaving blanks to be filled up; the blanks filled up in the attestation clause as above, in addition to the signature of the testator, are in italics.

Upon the papers being brought before the Judge, he drew the attention of the solicitor filing them to the position in which Fannie Lomas was apparently placed by reason of her signature as a witness, she being the sole devisee and executrix: see the Wills Act, R. S. O. 1897 ch. 128, sec. 17.

Thereupon an application was made to have the letters probate issued without the name of Fannie Lomas as a witness.

G. R. Geary, for the executrix.

WINCHESTER, SURR. C.J.:—In support of the application, affidavits of Harry Lomas, Mary Sarah Lomas, and Fannie Lomas have been filed.

The witness Harry Lomas in his affidavit states that his brother, the deceased, asked him to prepare his will for him, and he accordingly purchased a form and drew it up to his brother's satisfaction; he then arranged with his mother, Mary Sarah Lomas, and with the deceased, to have the same executed, and he discussed the execution of the will with Fannie Lomas, the wife of the deceased, who is the sole devisee and sole executrix under it, and told her that she could not be a witness to the will; that the three of them would go up to the hospital, where the deceased then was, and have the will executed, but that he and his mother would have to be the witnesses; that Fannie Lomas then fully understood that under the law she could not be an attesting witness to the will as drawn up, and understanding this she stated that she would not sign the will as a witness; that when going up to the hospital to have the will executed he thought it would not be possible for him to join them, and he then arranged with the said Fannie Lomas and his mother that if he were

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not present his mother should execute the will as witness and that one of the nurses should be called in as a second witness; they, however, went together to the hospital and had the will executed; that after witnessing the will he moved away from the bedside, and while he was away Fannie Lomas signed the will. He remonstrated with her for doing so, when she replied that she thought she was to sign it, as she was the executrix named, and that she did not sign it in any way as a witness, and did not intend by her signature to attest the execution of it; and that, instead of striking her name out, they concluded that, inasmuch as there were two regular witnesses, her signature might be left as executrix or devisee in case the signature of such a person should be necessary, but that they all understood that only two witnesses were necessary, and that Fannie Lomas could not sign the will as a witness, as she was the devisee, and that only the other two of them were signing as attesting witnesses.

This affidavit is corroborated by the affidavits of Fannie Lomas and Mary Sarah Lomas, Fannie Lomas stating that she signed the will as devisee and executrix, thinking it necessary that she should do so in such capacity; that she did not sign it as an attesting witness, nor did she attest the signature of her husband, for at the time she well knew that the will had to be executed by the testator in the presence of two witnesses, neither of whom could be a person taking a benefit under the will; and that, in the case of one of the witnesses taking a benefit under the will, his signature as an attesting witness would render the devise or legacy void; and for this reason she was careful to see there were two witnesses to the will attesting the signature of the deceased.

In In the Goods of Thomas Brightman Sharman (1869), L. R. 1 P. & D. 661, the testator made his will in favour of his sister, bequeathing all his goods and chattels to her, and executed it in the presence of two witnesses, and, in addition to their signature, his sister, the sole devisee, also placed her signature at the foot of the will, beneath the signatures of the two witnesses; the affidavit of one of the witnesses stated that he had prepared the will for the testator, and after he and the other witnesses had signed their names as witnesses, he thought it would be desirable that the sole devisee should sign her name on the paper on which the will was written, not as a witness, but as the universal legatee named therein, and he intimated this to the

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deceased, who said he though his sister ought not to sign, but the witness afterwards, being under the impression that it was the proper course to pursue, requested the sister to sign, and she did so.

Lord Penzance, in delivering judgment, said: "In a case decided by Sir C. Cresswell he held that under ordinary circumstances it is not the duty of this Court to ascertain if there be two attesting witnesses, whether the name of a third person appearing on the face of the will was written as attesting the signature of the testator or not, but that such a question would be more properly raised in a Court of construction. No doubt, however, there are some considerations on this matter which deserve to be carefully weighed; amongst others that this Court is bound not to send up to the Court of construction anything which does not form part of the will itself. Now, if the name is not the name of an attesting witness, it is not a part of the will, and ought not to appear in the probate. In the present case, such a duty is forced upon the Court, because, not only the question what is the will, but also the question to whom the grant shall go, depends upon the previous question, whether Miss Sharman is interested under the will or not. If she attested the signature of the deceased, she forfeited all interest under the will; if she did not attest the signature, her name forms no part of the will. On the evidence before me, I can have no hesitation in saying that she did not attest the signature of the deceased. When a testator has signed his name in the presence of two witnesses, and at his request they attest his signature, the execution is complete, and if a third person afterwards adds his name, the Court will not come to the conclusion without cogent evidence that that third person signed as an attesting witness." See also In the Goods of E. J. Smith (1889), 15 P. D. 2.

The evidence produced before me in this case is stronger than that produced before Lord Penzance in In the Goods of Sharman, and I have no hesitation in accepting the statements made in the affidavits as being perfectly reliable, and I therefore hold that Fannie Lomas did not attest the signature of the testator to the will as one of the witnesses thereto. I do not, however, consider that it is my duty to withhold the name of the devisee from the probate, as was done in the Sharman case.

Letters of probate will issue in the usual form.

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RE TUCKETT.

Will—Attempted Revocation by New Instrument—Failure of Attempt by Reason of Husband of Sole Devisee Attesting Instrument—Destruction of Original of Former Will—Production of Copy—Admission to Probate—Dependent Relative Revocation.

Application by Frederick M. Tuckett and Martha Tuckett for letters of probate to the will of Emma Carroll Tuckett, deceased, dated 30th August, 1906, the original of which had been destroyed or mislaid.

J. A. Ferguson, for the applicants.

WINCHESTER, SURR. C.J.:—Miss Tuckett, the deceased, made a will subsequent to the above, dated 22nd October, 1906, in which she devised all her estate, real and personal, to her mother, Martha Tuckett. In it she revoked all former wills, or testamentary dispositions, and appointed her father and mother executors. Unfortunately, her father was one of the two witnesses to the execution of the will, and I held that under the Wills Act, R. S. O. ch. 128, sec. 17, the devise to Mrs. Tuckett was void. That section provides: "If any person attests the execution of any will, to whom, or to whose wife or husband, any beneficial devise, legacy, estate, interest, gift, or appointment of or affecting any real or personal estate (other than and except charges and directions for the payment of any debt or debts), is thereby given or made, such devise, legacy, estate, interest, gift, or appointment shall, so far as concerns such person attesting the execution of such will, or the wife or husband of such person, or any person claiming under such person, or such wife or husband, be utterly null and void. . . ."

The devise to her mother being of the whole estate of the testatrix, I held that under the circumstances the will was wholly inoperative so far as it affected the devise to her mother.

Thereupon a copy of the will of 30th August, 1906, was produced, and an application made for probate. The ap-

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plication is accompanied with the affidavit of the father of Miss Tuckett, explaining the reasons for drawing the later will, and shewing that it was intended only to take the place of the first will. This affidavit is corroborated by one from the solicitor who advised as to the form of the same, but unfortunately was not present at its execution. Affidavits of the sisters and mother are also produced as to the loss of the first will. The question is, whether the application can be granted in the face of the revocation of all former wills by the later one.

The following cases were cited in support of the application: Scott v. Scott, 1 Sw. & Tr. 258; Clarkson v. Clarkson, 2 Sw. & Tr. 497; In the Goods of Elizabeth Middleton, 3 Sw. & Tr. 583; and Dancer v. Crabb, L. R. 3 P. & D. 98.

In Scott v. Scott, the deceased died on 6th December, 1857, having duly executed a will, dated 21st February, 1852, and a codicil dated 25th May, 1854. On 20th August, 1857, he signed a document purporting to revoke this will and codicil. After he had executed this document, a suggestion was made to him to burn the previous will and codicil, inasmuch as he had made a new one, when he observed, "I suppose there is no use in keeping the old ones, as I have made a new one," and accordingly he burned them. It subsequently turned out that the document dated 20th August, 1857, was not duly executed as a will. A declaration was filed propounding copies of the will of 21st February, 1852, and the codicil of 25th May, 1854. Affidavits were produced proving the due execution of the will and codicil, and that the copies before the Court were true copies. Counsel submitted that the deceased had only destroyed these papers on the supposition that the latter will was valid and duly executed: and that, as that was not so, they were entitled to probate.

Sir C. Cresswell, in his judgment, said: "The construction put upon this transaction by Dr. Addams (counsel) is, I think, the correct one. There is no reason to doubt the truth of the affidavit. I must take the fact to be that the deceased having, as he supposed, duly executed a second will, said, 'Now I have executed this will, the former will and codicil are of no use,' and he destroyed them. He intended only to destroy the first will in substituting another for it. The first will and codicil, therefore, are entitled to probate."

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In Lee Clarkson v. Margaret Clarkson and others, and Thoman Clarkson (heir-at-law) intervening, 2 Sw. & Tr. 497, B. duly executed his will in August, 1857; in July, 1859, he executed another will purporting to revoke the will of 1857; in a suit respecting the validity of the will of 1859, the Court of Probate pronounced against the validity of such will. The draft of the will of 1857 was then propounded, and it was proved that after the execution of the will of 1859, B. had called for the will of 1857, and after appearing to read it, had torn it up, saying: "It is of no use keeping this now; I have another." Most of the above facts were admitted on the record, and the Court, holding that there was no proof of the destruction of the will of 1857 with intention to revoke, so as to satisfy 1 Vict. ch. 26, sec. 20, decreed probate of the draft thereof.

In In the Goods of Elizabeth Middleton, deceased, 3 Sw. & Tr. 583, the testatrix duly executed her will in 1855, and in 1862 she signed another will, being a copy of the former one, with the exception of bequests to her niece, but which was not duly attested. In 1864 she cut out the names of the attesting witnesses to the earlier will in the presence of a fellow-servant. Both documents were retained in her possession until her death. Sir J. P. Wilde, in delivering judgment, said: "Upon a review of all the facts I am satisfied that the deceased, by cutting out the signatures of the attesting witnesses to the earlier will, only intended to revoke it on the assumption that the later will had been duly executed. The case, therefore, falls within the principle of dependent relevant revocation frequently acted on in this Court, and explained in Ex p. Earl of Ilchester, 7 Ves. 279-372. Probate of the will of 1855 will, therefore, be granted."

In Dancer v. Crabb and Thompson, L. R. 3 P. & D. 98, the testatrix, having her will in her hand, dictated the alterations she desired to be made in the first part of it to a friend, who wrote them down. She, feeling unwell, desired her friend to stop there, and then tore off and burned so much of her will as had been covered by the memorandum written at her dictation. This memorandum, together with the rest of the will, which contained the residuary clause, and the signatures of the testatrix and witnesses, and the attestation clause intact, was placed in a desk by the testatrix and locked up, and she believed when she did so that these papers constituted a new will, and not merely

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instructions for such a will. Sir James Hannen, in delivering judgment, after referring to a number of authorities, said: "The decisions cited from Clarke v. Scripps down to Eckersley v. Platt and others, do not affect the application to the present case of the earlier authorities I have referred to. They enforce, under varying circumstances, the principle that, although the testator does an act which, unexplained, would be one of revocation, yet if it appear that he did it only as a part of the means of setting up another will, if that end be not accomplished, the former will is not revoked. Or, to state the proposition in different language, if the testator's act can be interpreted thus: 'Whatever else I may do, I intend to cancel this as my will from this time forth,' the will is revoked; but if his meaning is, 'as I have made a fresh will my old one may now be destroyed,' the will is not revoked if the new one be not in fact made." See also the following cases: Cossey v. Cossey (1900), 16 Times L. R. 133, and Dixon v. Solicitor to the Treasury, [1905] P. 42.

In the present case the facts sworn to clearly indicate that the later will was intended to take the place of the earlier one, and that the earlier will was only revoked on the supposition that the later one was effective; and, it not being effective, the earlier will is not therefore revoked; and, following the above decisions, I direct letters probate of the will of 30th August, 1906, to issue.

WINCHESTER, SURR.C.J. APRIL 29TH, 1907.

SURROGATE COURT, YORK.

RE PHIPPS.

Executors—Renunciation by two out of three Named in Will —Grant of Probate to Third Executor—Subsequent Retractation of Renunciation—New Grant of Probate.

Application on behalf of Clark Ernest Phipps and Caroline Louisa Stuart, executor and executrix named in the will of John Phipps, deceased, to be at liberty to retract the renunciation of executorship executed by them in April,

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1895, when the application for probate was originally made on behalf of the executrix now acting, and for an order directing letters of probate to issue to them.

Thomas Urquhart, for the applicants.

WINCHESTER, SURR. C.J.:—The ground of the application is that the executrix Julia Jane Phipps, the mother of the applicants, is becoming unable to look after the estate in consequence of her increasing years, and she is desirous of having the applicants, who are her son and daughter, appointed executors to enable them to look after the estate for her.

By our Surrogate Courts Act, R. S. O. 1897 ch. 59, sec. 65, it is enacted that "where a person renounces probate of the will of which he is appointed executor (or one of the executors), his rights in respect of the executorship shall wholly cease, and the representation to the testator and the administration of his effects shall and may, without any further renunciation, go, devolve, and be committed in like manner as if he had not been appointed executor." Chief Justice Sir Adam Wilson, then Mr. Justice Wilson, held, in Allen v. Parke (1866), 17 C. P. 105, that the object of this legislation was to adopt the more reasonable rule of the civil lawyers and to make the renunciation peremptory. It was unnecessary for the decision in that case to have considered the above section, but unless there is strong reason for not following the obiter dictum of so able a jurist as the late Sir Adam Wilson was, I feel bound to follow it. In In the Goods of Badenach (1864), 3 Sw. & Tr. 465, cited by counsel in Allen v. Parke, it was held by Sir J. P. Wilde that the executor having renounced on a statement that he had not intermeddled in the estate of the deceased, and it appearing that he had intermeddled, and therefore he was not, at the time he renounced, in a position to execute a renunciation, it was an invalid act; and leave was given to the applicant to take probate, notwithstanding that a similar section to the one above set out was in force at the time, and relied on by counsel opposing the application.

In In the Goods of McGill (1873), 3 P. D. 113, Sir J. Hannen, referring to this section of the statute, said: "Unless, on fuller consideration, I should feel that the words of the statute are imperative, I should not hastily decide

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that this Court is powerless to permit an executor who had renounced, on good grounds, to retract his renunciation."

In In the Goods of Stiles, [1898] P. 12, Sir F. H. Jeune, President of the Division, held that the old practice, which, in a proper case, allowed a co-executor, who had renounced probate, to retract his renunciation, is not abrogated by sec. 79 of the Court of Probate Act, 1857, 20 & 21 Vict. ch. 77; this section is similar to sec. 65, above set out. In delivering judgment he said: "I think that I ought to decide this point, which appears up to the present time to have been left open, in favour of the applicant. I see no reason in the nature of things why, in a proper case, where circumstances have altered, one of the several executors should not be allowed to retract his renunciation and carry on the executorship. Under the old law, where all the executors of a will renounced, and administration had been granted, the renunciation could not be retracted, for the obvious reason that the representation had been suffered to go into another channel, and the executors could not be allowed to come in and alter the state of things to which their conduct had given rise. But, where some executors proved, and others renounced, those who had renounced were allowed to retract, as they could then be let in without altering the devolution of the representation, seeing that they would only occupy the position which they might have originally assumed. Now, the 79th section of the Act of 1857 says: 'Where any person, after the commencement of this Act, renounces probate of the will of which he is appointed executor . . . the right of such person in respect of the executorship shall wholly cease, and the representation to the testator and the administration of his effects shall, and may, without any further renunciation, go, devolve, and be committed in like manner as if such person had not been appointed executor.' I think that the words, 'the rights of such person shall wholly cease,' are to be read in connection with those that follow, and that the effect is merely that when an executor has renounced it shall not afterwards be necessary to cite him. This seems to have been the view of Lord Penzance in In the Goods of Witham (1866), 1 P. & D. 303, where an executor who had renounced before the passing of the Act, retracted that renunciation for the purpose of renouncing again after the passing of the Act, and so bringing himself under it. Lord Penzance said: 'It is

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the purpose of taking a grant, and was in fact a part of the application for a grant. Except for that purpose, I think that it is not possible for an executor to retract his renunciation.' I think that this passage shews that Lord Penzance adhered to his former view, and did not consider that the section had in any way changed the former practice in respect to renunciation. Lord Hannen in the cases which have been cited can hardly be said to have expressed any definite view. I think, therefore, that in a proper case one of several executors may be allowed to retract his renunciation."

It has been held that it is the duty of Courts in this country to follow the decisions of the higher Courts in England, where the decision is on the same, or similar, point at issue.

The decision in In the Goods of Stiles is direct on the question, and being the latest decision on the point, I am bound by it. The grounds on which the present application is made are, in my opinion, of such a character as to bring it within the English decisions, and I therefore allow the application, and order that the executors be at liberty to retract their renunciation, and that probate be issued to them.

WINCHESTER, SURR. C.J. MAY 6TH, 1907.

SURROGATE COURT, YORK.

RE COLEMAN.

Will—Neglect to Appoint Executor—Application of Husband and Beneficiary for Probate according to the Tenor of the Will—Grant of Letters of Administration with the Will Annexed.

Application for the grant of letters probate of the will of Selina Ann Coleman, deceased, to the husband of the testatrix, he not being appointed as executor by the will.

J. T. Richardson, for the applicant.

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WINCHESTER, SURR. C.J.:—By her will, dated 17th July, 1906, the testatrix devised all her estate to her husband in the following manner: " . . . I bequeath to the said Charles Coleman, of the same place, all my goods and chattels; I also bequeath to the said Charles Coleman . . . all of that parcel of land fronting on Eastern avenue . . . I also bequeath to the said Charles Coleman all my vacant land in the town of East Toronto . . . the said Charles Coleman to have the right to sell or dispose of all the said property at any time."

Counsel for the applicant contends that the husband of the testatrix is entitled to probate according to the tenor of the will, and refers to Williams on Executors, 10th ed., p. 165, in which it is stated that the appointment of an executor "may either be express or constructive, in which case he is usually called executor according to the tenor, for, although no executor be expressly nominated in the will by the word executor, yet if by any word or circumlocution the testator recommends or commits to one or more the charge and office, or the rights, which appertain to an executor, it amounts to as much as the ordaining or constituting him or them to be executors," and reference is made at p. 166 to a number of cases illustrating the principle above set out. Among these is the case where the testator in his will says, "I leave all my goods to A.B.," and these words, it is stated, amounted to the appointment of A.B. as executor "according to the tenor," and in a note the case of Androvin v. Poilblanc (1745), 3 Atk. 301, is referred to. In that case Lord Hardwicke said a person named "universal heir" in a will would have a right to go to the Ecclesiastical Court for the probate.

The question, however, came up before the Court of Appeal in In the Goods of Elizabeth Pryse, [1904] P. 301, where it was held that the universal devisee and legatee of a testamentary paper in which no executor is named, is entitled to administration with the will annexed, but not to a probate according to the tenor of the will. Elizabeth Pryse, who died in January, 1903, by her will of 16th August, 1901, left all her property whatsoever to her daughter Sophia, and directed her said daughter to pay a mortgage debt of £60 due upon her freehold property, and further directed that in consideration of her doing so the whole of her said freehold property should go to the daughter abso-

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lutely. No executor was appointed by the said will, and no beneficiaries were named other than the testatrix's daughter Sophia, now the wife of William Evans. The daughter applied for a grant of probate of the will to her as executrix according to the tenor thereof. The registrar declined to allow probate to issue, being of opinion that Sophia Lewis was not the executrix according to the tenor on the construction of the will. Sophia Evans then applied to the President to decree probate of the will to her according to the tenor thereof. The President refused her application, and she thereupon appealed to the Court of Appeal and that Court dismissed the appeal. Lord Justice Vaughan Williams in his judgment said: "In this case we postponed our decision in order that we might consult the Judges of the Probate Division, and ascertain what circumstances govern the practice of that Division of the Court. Now it is admitted, quite irrespective of those inquiries, that for a very large number of years—100 years or more—the practice in the Probate Court in cases where some one is not named as executor in the will, and no duties are indicated in the will that would constitute him executor thereof according to the tenor, but who has such an interest that, in spite of not being named as executor, he might be looked to to act as such, has been, not to grant probate, but to grant letters of administration with the will annexed. That being admitted to have been for a long time the practice, it was suggested that it had been recognized in In re Oliphant (1860), 1 Sw. & Tr. 525, that the practice might be departed from in certain cases; and, as it was further suggested that by reason of the law having been modified by the Land Transfer Act, 1897, in respect of the devolution of land on death, there was a reason why the prevailing practice should not be followed, and that the practice which was suggested in Androvin v. Poilblanc, 3 Atk. 298, 303, referred to in the case of In re Oliphant, should be either substituted for it, or substituted for it at the discretion of the Court. . . . Upon the question of what the present practice is, the President of the Probate Division has informed me that the practice is still that which has been in force for so very many years, and he has further informed me that to alter the practice would make considerable trouble and confusion in the office. Under those circumstances, it seems to me that this appeal fails altogether."

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The practice followed in the several Surrogate Courts of this province with reference to the issue of letters probate and letters of administration is provided for by R. S. O. 1897 ch. 59, sec. 37, which is as follows: "Unless otherwise provided by this Act, or by the Rules or Orders respecting Surrogate Courts heretofore in force, or hereafter to be made under this Act, the practice of the Surrogate Courts shall, so far as the circumstances of the case will admit, be according to the practice of Her Majesty's Court of Probate in England, as it stood on the 5th day of December, 1859."

The decision in In the Goods of Elizabeth Pryse declares that the practice in the Probate Court in England on the above date, in cases where some one is not named as executor in a will, and no duties are indicated in the will that would constitute him executor thereof according to the tenor, but who has such an interest that, in spite of not being named as executor, he might be looked to to act as such, has been not to grant probate but to grant letters of administration with the will annexed.

In the present case, the husband of the deceased, while receiving all the estate of the testatrix, would be entitled to apply to the Ecclesiastical Court under Androvin v. Poilblanc for the probate of the will, but he is not now entitled to do so under the practice of the Probate Court, he not having been named in the will as executor, and no duties being imposed upon him by the will that would constitute him executor thereof according to the tenor, but he is entitled to a grant of letters of administration with the will annexed. The order will issue accordingly.

TEETZEL, J. MARCH 26TH, 1907.

TRIAL.

HILL v. TORONTO R. W. CO.

Street Railway—Injury to Person Crossing Track—Negligence—Excessive Speed of Car—Failure to Shew that Injury Due to Speed—Nonsuit.

Action by Thomas Hill to recover damages for injuries sustained by him owing to the alleged negligence of defendants.

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Plaintiff alleged that on 25th September, 1906, while crossing Dundas street, he was struck by one of the defendants' cars, from which he received serious injuries, and for which he claimed damages, upon the ground that the car was travelling at a dangerous and excessive rate of speed, and that defendants' servants operating the car failed to give the necessary warnings.

Plaintiff in support of his case called a number of witnesses who testified as to the speed of the car, their estimates varying from 8 to 15 miles an hour—one witness said 20 miles an hour. No witnesses, however, were able to say how plaintiff came to be struck. The evidence shewed that there was nothing in the street to obstruct his view, and one witness said he apparently did not look as far as he could see. Plaintiff himself was unable to explain how the accident happened. The evidence as to the ringing of the gong was unsatisfactory, some of plaintiff's witnesses swearing positively that it did ring, while others said they did not hear it.

At the conclusion of the plaintiff's case, D. L. McCarthy, for defendants, moved for a nonsuit, upon the ground that. even if the plaintiff had succeeded in proving that the car was travelling at a smartish pace, there was no evidence to shew that there was any by-law fixing speed, nor was the speed, if proved, connected in any way with the cause of the injury, and, even if the car was travelling at an excessive rate of speed, it would not justify plaintiff in placing himself in a position of danger in front of it. He also contended that upon the plaintiff's own statement and the statements of the witnesses, he was clearly the author of his own wrong, and if he had looked he could have seen the car, and if he did not look it was his duty to have looked before crossing at a place which he was accustomed to cross every day, and which he knew was a place of danger, inasmuch as cars were frequently passing up and down.

W. Davidson, for plaintiff, contended that on the proof of speed alone he was entitled to have his case sent to the jury, notwithstanding the fact that he did not connect the alleged speed with the accident to the plaintiff.

TEETZEL, J.:—The defendants are entitled to my view. It may be wrong; if it is, the plaintiff will have the right to have it set aside by a Divisional Court, at the expense of

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defendants. The defendants have a right to my view, and, having a strong view upon it myself, I would not be performing my duty unless I expressed it and gave the defendants the benefit of it. In my opinion, the plaintiff has failed to establish by evidence any legal claim against this company, for two reasons. While he has shewn that the car was running at a high rate of speed along this street—at a rate of speed which, I assume, a jury would be justified in finding was improper, and on account of which they might be liable to prosecution for breach of the city by-law regarding speed —that is not sufficient to entitle a plaintiff who may be injured to claim damages against the company without going further and shewing that that circumstance, and that circumstance alone, was the cause of the plaintiff's injury. A car may be going at a higher rate of speed than is justified by the by-laws or contract with the city, or justified by common law, and some one may be hurt in the street, and if that only is shewn, that is not sufficient to entitle that person to recover, in my view. As a part of his case he must shew that it was the speed of the car and that alone which caused his injury. In other words he must connect the default, the negligence of the company, with the injury sustained. In every case of an action for damages for injury it is necessary to find first that there was negligence, and second that that negligence was the cause of the plaintiff's injury. Here I fail to find any evidence at all that such was the case. Furthermore, it seems to me that this unfortunate plaintiff, upon the evidence offered here, unexplained by himself, without any justification, walked up against this car or walked so close to the car as to be inevitably struck. It was broad daylight, nothing that we have heard of to obstruct his view at all; no excuse to offer for his not seeing the car and stopping and allowing it to pass, instead of walking up so close to it that he would be struck by it in passing. Nor is there anything that shews that he was deceived in any way by the practice of the company or by anything that the company did or omitted to do on that occasion. The plaintiff is in the unfortunate position of not being able to give any intelligent account himself of how the accident happened. That is his misfortune. He has undoubtedly been a great sufferer, and his physical health and mental condition are permanently impaired. He is an object provoking great sympathy from any one who knows his condition. It is a very unfortunate

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affair for him. Probably it has deprived him now of the ability to earn a livelihood for himself, and he will be left a burden upon his friends. But the law does not recognize any claim on the ground of sympathy for misfortune when an action is brought for damages. The plaintiff in such cases must establish a legal right against the company, against the defendants, to compensate him for the injuries he has sustained. It would seem to me clear, admitting that the company were running their car at an unusual rate of speed, that this plaintiff in coming out upon the highway and attempting to cross had an equal duty to look out for passing cars, either slowly or rapidly passing cars. Any one walking across a railway or street railway track has a duty imposed upon himself, not only to himself but to the tavelling public and to the whole community, to watch out for passing cars. It is inconceivable to me how, if this plaintiff had cast up his eyes at all in the direction from which the cars on that track would be approaching, he could have failed to see this car. It was travelling for several hundred feet north of him, and it was, as I said before, broad daylight, and there was nothing to obstruct his view. Whether he was meditating or blindly going across in an absent-minded way regardless of the track and heedless entirely of the danger, I do not know. If he was, that is his own misfortune. It seems to me that it was his plain duty, as it is the duty of every one, to look out for passing cars, and if an accident happens, notwithstanding that the car may have been going faster than it ought to have gone, it cannot be said that it was solely the speed of the car that caused the accident, but it can be equally said that his failure to look was the cause of the accident; that he himself was equally guilty of negligence in crossing a railway track with a company moving its cars too fast down the track; and in such a state of facts, where both parties are guilty of negligence, the plaintiff cannot succeed. The plaintiff cannot recover against a defendant where he himself, on his own evidence, acted in a manner which necessarily contributed to the injury which he suffered. In this case I think it is incontrovertible that this unfortunate plaintiff, by his omission to exercise ordinary care in crossing a street car track, collided with the car, and suffered the injuries which have been so serious to him. The railway company are not insurers to every one who travels on the street. They are

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bound to exercise reasonable care in the operation of their cars, but citizens using the highway are equally bound to use ordinary care not only to protect themselves, but to protect the street railway property, and if both the traveller on the highway and the railway company are guilty of negligence at the same time and an injury happens, the man who is injured has no right to recover for the joint act. Both acts of negligence concur in producing the injury. For these reasons, I think it is quite clear that this unfortunate plaintiff has not established a right to compensation for his injury against the defendants. If I am wrong in this view the plaintiff can succeed in having it put right, and having the costs of this trial and of his appeal no doubt imposed upon the company.

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THE

ONTARIO WEEKLY REPORTER

VOL. IX. TORONTO, JULY 4, 1907. No. 19

BRITTON, J. MAY 16TH, 1907.

CHAMBERS.

RE CHARLES H. DAVIS CO. LIMITED.

Company—Winding-up—Petition for Order—Discretion—Opposition of Majority of Creditors—Rights of Minority—Costs.

Motion by certain creditors to vacate a winding-up order granted on 7th May.

A. C. McMaster, for applicants.
W. N. Tilley, for petitioning creditors.

BRITTON, J.:—I quite realize that there is a discretion to grant or refuse a winding-up order, as pointed out in Re Strathy Wire Fence Co., 8 O. L. R. 186, 4 O. W. R. 889, and I somewhat reluctantly exercise the discretion in this case against what seems to be the wish of a majority of the creditors of this company—but minority creditors have their rights, and, having regard to the allegations in reference to the formation of a new company to take over a portion of the business carried on by the Charles H. Davis Co. Limited, I am of opinion that the winding-up order should be made.

Were Mr. Martin now in the country, I would name him as provisional liquidator, but, as he is not, Mr. Langley will be appointed as such provisional or interim liquidator.

This is a case in which the creditors represented by Mr. McMaster were entitled to be heard, and their costs of opposing the petition, as well as the costs of the petitioning creditors, should be paid by the liquidator out of the estate.

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CARTWRIGHT, MASTER.

CHAMBERS.

PORT HOPE BREWING AND M
ANAGH.

Solicitor—Change—Praecipe Order
Plaintiffs—Setting

Motion by the company plaintiff
order changing solicitor, taken out b

D. O'Connell, Peterborough, for

A. B. Morine, for the other plain

THE MASTER:—It is quite clear
numerous, can only have one solicito
in order to effect a valid change.

It is not denied that in this case
taken out without the consent of th
therefore, be set aside with costs.

If the plaintiffs in a cause becom
to the conduct of the action so that
separate application, he can do so
settled practice. See In re Matthew
463, and cases there cited; also In re W
[1895] 2 Ch. 747.

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